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No. 99- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SYSCO FOOD SERVICES OF SAN FRANCISCO, INC.,

Petitioner,

v.

BRENDA NORRIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May the district court award a plaintiff attorney's fees where:

1. Plaintiff prevails on her claim under the ADA (42 U.S.C. §§ 12101-12213) and on a "mixed motive" Title VII sex discrimination claim [42 U.S.C. § 2000e-5(g)], but loses on thirteen other discrete theories; and

2. Plaintiff not only fails to support her fee petition with evidence (such as contemporaneous attorney time records) adequate to enable the district court to determine the extent to which fees were incurred in connection with claims on which she prevailed, as opposed to claims on which she failed to prevail [as required by *Hensely v. Eckerhart*, 461 U.S. 424 (1983)]; but

3. Fails to adduce **any** competent evidence of actual attorney time spent (in the process ignoring the district court's order to supplement the initial submission in support of the petition), thus leaving the District Court to "guesstimate" a "reasonable" attorney's fee.

PARTIES TO THE PROCEEDING

The parties to this proceeding are set forth in the caption; Petitioner Sysco Food Services of San Francisco, Inc. (formerly Allied-Sysco Food Services, Inc.), a California corporation, the defendant below, and Respondent Brenda Norris, an individual, the plaintiff below.

RULE 29.6 LISTING

Petitioner is a wholly owned subsidiary of Sysco Corporation, a publicly held Delaware corporation having its principal place of business in Houston, Texas.

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Petitioner, Sysco Food Services of San Francisco, Inc. ("Allied"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in *Norris v. Sysco Corporation and Allied-Sysco Food Services, Inc.*, Nos. 97-15447 and 97-16716 is not yet published. A true and correct copy of that opinion is submitted herewith as Appendix A. The opinion of the District Court in *Norris v. Sysco Corporation and Allied-Sysco Food Services, Inc.*, No. C94-0433 WDB, is set forth in the Order and Memorandum Opinion re Plaintiff's Petition for Attorney's Fees and Expenses, entered August 8, 1997 is unpublished. A true and correct copy of that opinion is submitted herewith as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") was entered on September 14, 1999.

Norris, in initiating this action, asserted numerous bases for federal jurisdiction, including Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000, *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The attorney's fee provision of the Americans with Disabilities Act is set forth at 42 U.S.C. § 12205:

> In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

The attorney's fee provision with respect to Title VII "mixed motive" cases is set forth at 42 U.S.C. § 2000e-5(g)(2)(B):

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court–
>
> (i) may grant declaratory relief, injunctive relief [except as provided in clause (ii)], and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

STATEMENT OF THE CASE

The issue presented here is whether a district court may award attorney's fees to a plaintiff who has prevailed on two out of more than fifteen theories, where plaintiff not only fails to present evidence from which the district court can determine how much attorney time was spent on the successful theories as opposed to the unsuccessful theories, but fails to present evidence from which the district court can determine how much attorney time was spent on the matter, period. To put the issue more starkly, may a district court use its own judgment to fashion, out of whole cloth, an attorney's fee award, where the plaintiff, who under the precedents established by this Court's decisions has the "burden" of supporting a fee petition, does virtually nothing to shoulder that burden?

A. Trial of the Matter in the District Court.

Respondent Norris brought this action against her employer, Allied, and Allied's parent company, Sysco Corporation, in February 7, 1994. All claims against Sysco Corporation were dismissed by summary judgment prior to trial, which began on October 1, 1996. The trial ended on October 22, 1996, with a verdict in Norris's favor in the amount of $300,000 in emotional distress damages.

In her final amended complaint, Norris alleged fifty-two (52) separate claims against Allied and its parent. When the case went to the jury, fifteen (15) claims against Allied survived. These claims alleged sex and age discrimination in connection with promotion decisions and job assignments, retaliation for complaining of alleged discrimination and sexual harassment, sexual harassment, disability

discrimination in refusing to permit Norris to return to work, disability discrimination in terminating Norris's employment, sex discrimination in terminating the employment, fraud and intentional infliction of emotional distress.

The jury rejected all but two of Norris's claims. The jury found disability discrimination in connection with her termination, and found sex discrimination in connection with a promotion decision, but found further that Norris would not have been promoted in any event. The damage award was made only on the disability discrimination claim.

Following the verdict, Allied moved for judgment as a matter of law or for a new trial. The motion was denied and Norris filed a petition for attorney's fees.

B. Proceedings in the District Court on the Fee Petition.

The district court authored a forty-four (44) page Order and Memorandum Opinion Re Plaintiff's Petition for Attorney's Fees and Expenses, which Order is submitted herewith as Appendix B. (pp. 21a-86a). The Order leaves no doubt as to the district court's frustration with Norris's submission. The Order begins by outlining Norris's many claims and notes that "the jury ruled against Ms. Norris on the majority of these claims." The district court begins its discussion of the attorney's fee petition as follows:

> Although plaintiff received relief only on her claim that Allied terminated her in violation of the ADA, she seeks reimbursement of *all* fees and costs incurred in this action. Moreover, despite the fact that since the Supreme Court's 1983

> decision in *Hensley v. Eckerhart*, 461 U.S. 424, plaintiff's counsel has been on notice of his obligation to document his billing in a manner that will permit the Court to identify the nature and subject matter of the tasks performed in connection with his client's case and the number of hours expended thereon, the majority of counsel's documentation describes his efforts in only the most general terms, without identifying the claims to which his work pertains or the number of hours expended on each task performed.

Order at 5:6-14, Appendix B, 27a.

The Order addresses Norris's evidentiary submission at pages 14-17. The hearing on Norris's fee petition was originally set for January 29, 1997. The district court, due to the paucity of Norris's showing, did not rule on that date but instead "ordered plaintiff and her counsel to submit additional documentation that would enable the court to determine which hours were reasonably expended on plaintiff's successful claims." The district court did not merely deem Norris's initial submission inadequate; he deemed it worse than inadequate: "[Norris's counsel's] records make it virtually impossible to determine how much time he actually spent on (1) each of plaintiff's various claims; or (2) the individual tasks or undertakings listed in his billing statements." Apendix B, 40a. The district court's recital of the "serious defects" in the billing statements include:

1. No evidence that counsel made a good faith effort to eliminate excessive, duplicative or unnecessary hours;

2. Commingled and undifferentiated estimates of time spent productively and unproductively;

3. "Only cryptic overly-general work descriptions that fail to identify the claims to which the tasks pertained;"

4. Insufficient break-out by task to permit determination of whether the time was recoverable or reasonably expended;

5. As to those "relatively few entries where the Court could determine the hours expended on a specific task, [counsel] *often* claimed much more time for specific tasks than any competent lawyer would have spent;"

6. "Ubiquitous" entries designated as "Review file," which the district court found to give no guidance on the issue of reasonableness;

7. Counsel billed "almost invariably" in half-hour increments without submitting evidence that such a practice (which the district court found "patently unreasonable") was accepted in the relevant market; and

8. A failure to submit contemporaneous time records, notwithstanding counsel's declaration, under oath, that his "contemporaneous itemized bill" was submitted to the court. (Appendix B, 41a-45a).

The district court catalogued a number of obvious overbilling examples at note 10 of the Order (Appendix B, 42a-43a). These examples included 1.5 hours to draft a three sentence letter, 3.5 hours to review and edit a one-page letter prepared by his paralegal, 2 hours to review a one sentence notice regarding the scheduling of a status conference, and 8 hours a day while the jury deliberated — including the day it deliberated only six hours.

At the January 29, 1997 hearing, the district court not only afforded Norris and her counsel another three weeks to supplement their submission; he told them exactly what he wanted them to do: (a) retain an appropriate computer expert to repair counsel's billing software (which counsel had blamed for the absence of contemporaneous billing records); (b) file original computer generated documentation — or any documentation — reflecting all billed time as such time was contemporaneously recorded; and (c) submit "an appropriate declaration in which counsel identifies plaintiff's computer expert and describes the reasons for such expert's failure to solve counsel's inability to print original time-keeping records."

Norris and her counsel ignored the district court's order:

> Plaintiff's supplemental documentation was totally unresponsive to the Court's order. In fact, plaintiff repeatedly insisted that all of counsel's time was spent "100% . . . on Mrs. Norris' entire complaint as a whole . . ."
>
> In response to the order that he submit his contemporaneous records, counsel submitted an incomplete computer printout (the so-called "Contemporaneous Billing Statement") that did not differ substantially from the so-called "Revised Billing Statement" that he submitted initially. The Contemporaneous Billing Statement, like the Revised Billing Statement, provides no indication, within the vast majority of time entries, as to how the time was allocated among specific tasks billed in each entry. In fact, the Revised Billing Statement, presumably

> composed months or years after the fact, sets forth some time allocations that *did not appear* in the purportedly contemporaneous billing statement. The Revised Billing Statement also contains entries not found in the contemporaneous records.
>
> The Court directed [counsel] to submit documents, such as his witness interview outlines, that would help the Court conduct an independent analysis of the appropriate percentage allocation of work attributable to plaintiff's successful claims. Plaintiff, ignoring the Court's order, submitted no interview outlines, discovery requests, or any other documentation that would allow the Court to determine the recoverable portion of fees related to [counsel's] representation.
>
> The Court informed [counsel] that his practice of billing in one-half hour increments appeared patently unreasonable. Nonetheless, [counsel] submitted neither alternative, reasonable billing statements nor any support for his assertion that such a practice is common in the industry. In sum, plaintiff's supplemental submission contributed virtually nothing to the Court's ability to conduct the analysis that is necessary to fix a legally appropriate fee award.

Order, Appendix B, 45a-46a.

Thus, Norris and her counsel not only failed to provide evidentiary support for the fee application; they violated and ignored the order which the district court had made for the

purpose of giving them a second chance. The district court, however, rather than disallowing the petition, embarked upon extraordinary efforts to craft a fee for Norris out of whole cloth. First, abandoning Norris's petition as a guide, the district court devoted

> ten days of person-power . . . in a studied effort to analyze, parse, categorize, evaluate and allocate the pleadings and papers on file in this action, as well as the entries on plaintiff's billing statements, in order to determine the number of hours counsel expended on various tasks and which of those were compensable.

Order, Appendix B, 47a. These ten days of person-power proved a complete waste of the district court's time due to what the district court characterized as "defects in plaintiff's documentation."

After thus wasting "ten days of person-power," the district court was "forced . . . to resort to a reasoned 'across-the-board' percentage allocation method." Appendix B, 47a. The district court, in other words, accepted counsel's numbers (and counsel's numbers exceeded $715,000 in alleged compensable fees) — notwithstanding the court's acknowledgment that it had no confidence in those numbers — and applied percentage reductions to account for overbilling, unsuccessful claims, and degree of success. The district court does not reveal how many additional days of "person-power" were devoted to this exercise.

The bottom line was that Norris, despite adducing no admissible evidence of how much attorney time was actually spent (either on successful claims or on the case as a whole),

and despite ignoring the district court's order to supplement the initial submission, was awarded $247,840 in "attorney's fees" (and another $24,000 in costs).

The Court of Appeals for the Ninth Circuit, while nodding toward this Court's direction that it is the burden of the moving party to support its petition for fees, and conceding that Norris's "deficient" presentation may have justified the district court in refusing to make any fee award, nevertheless affirmed that court's decision, in part due to its reluctance to overturn a decision which the district court had worked so long and hard on:

> Nevertheless, the district court did not take [the approach approved by the Courts of Appeals for the Seventh and Tenth Circuits, whereby a failure to provide adequate evidentiary support for a fee petition results in the denial of the petition]. It, instead, expended "[a]pproximately ten days of person-power . . . in a studied effort to analyze, parse, categorize, evaluate and allocate" hours, all for naught. And it appears that because the court's efforts continued, it must have expended a great deal of time after that considering the information counsel presented and the record so that it could decide upon the appropriateness of an award. We see no need for such a large expenditure of judicial resources in the face of such a miserable presentation by a plaintiff's attorney, and surely this opinion should not be read as encouraging attorneys to keep sloppy records or judges to immolate themselves on a pyre of unhelpful computer printouts. On the other hand, we see no abuse of discretion when a district

court decides to struggle with the record and the issues as the court did here. *Cf. In re Washington Public Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305-06 (9th Cir. 1994). (Appendix A, 19a.)

REASONS FOR GRANTING THE WRIT

The decisions of the district court and the Ninth Circuit ignore the clear direction of this Court, in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) that "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended. . . ." Those decisions also run counter to the law of at least one other circuit (the Tenth) to the effect that a prevailing plaintiff is not entitled to fees where he or she fails to present evidence establishing the reasonable value of the legal services provided. *Pearson v. Western Electric Co.*, 542 F.2d 1150 (10th Cir. 1976), discussed below. Further, by sanctioning the award of substantial attorney's fees where the fee applicant not only fails to adduce competent evidence of the actual amount of time spent on a case, but affirmatively refuses to comply with the district court's order to supplement his evidentiary showing, the decisions below make bad public policy.

Despite the Ninth Circuit's optimistic suggestion that its opinion not be read to encourage attorneys to be lax in their obligations to keep accurate, reasonably specific, contemporaneous time records, this is precisely the effect its decision will have. The Ninth Circuit here endorses a procedure in which a district court devotes weeks of it own time in constructing an estimate of what a reasonable fee might have been for the benefit of a litigant who not only failed utterly to carry the burden required by this Court's

decisions, but affirmatively ignored the district court's order to submit specific items of evidence.

The Ninth Circuit has, previously, recognized that "[t]he fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked." *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (1992), citing *Hensely v. Eckherhart*, 461 U.S. 424 (1983). *Hensely* was a case similar to this one. Plaintiff had prevailed on some claims and failed to prevail on others. The statutory authority to award fees extended only to prevailing claims, thereby requiring plaintiff to provide the court a basis to distinguish between time spent on successful claims and time spent on unsuccessful claims. This Court held not only that "the fee applicant bears the burden of . . . documenting the appropriate hours expended . . ." but that such applicant "should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *Hensley, supra*, at 461 U.S. 437. Respondent here, of course, did neither.

There is effective unanimity among the Courts of Appeal that fee applicants have the burden of proving their reasonable attorney's fees and that a failure to do so vests the district court with the discretion to award no fee at all (as the Ninth Circuit recognized here). The question which remains unanswered (at least in the minds of the Ninth Circuit panel in this case) is whether, given a total failure — indeed, a refusal — to carry that burden, may the district court still award what it deems a "reasonable" fee? Stated another way, what are the consequences, if any, to a "prevailing" plaintiff of failing (or here, refusing) to carry the burden?

In *Hensely*, Chief Justice Burger, concurring, was quite clear as to his position:

> A district judge may not, in my view, authorize the payment of attorney's fees unless the attorney involved has established by clear and convincing evidence the time and effort claimed and shown that the time expended was necessary to achieve the results obtained.

437 U.S. at 440-441.

The Court of Appeals for the Tenth Circuit, back in 1976, anticipated the position later taken by the Chief Justice (although not necessarily the Chief Justice's view as to standard of proof) in *Pearson v. Western Electric Co.*, 542 F.2d 1150, 1153 (10th Cir. 1976). That court held that a prevailing party "would not be entitled to attorney's fees" if he "did not present evidence establishing the reasonable value of the legal services rendered."

The district court here was of the view that, having prevailed on some part of her case, Norris was "entitled" to attorney's fees: "Defendant does not dispute that plaintiff, as a prevailing party at this juncture, would be entitled to her fees . . ." Order at 6, note 3. The district court was wrong. Allied did and does dispute the proposition that a prevailing plaintiff, without more, is "entitled" to a fee award. A prevailing plaintiff must establish an evidentiary basis for an award of "reasonable" fees. If he or she cannot or will not, there should be no "entitlement."

The statutes cited above provide that the courts "may" award attorney's fees to a prevailing party; they do not say "must." As the Seventh Circuit noted in *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980), denying an attorney's fee to a prevailing plaintiff who sought an "intolerably inflated" fee:

> [T]he applicable statute provides that the court in its discretion *may* allow counsel fees. As Chief Justice Thomas McKean of Pennsylvania once remarked on a memorable occasion, "may" sometimes means "won't."

The decisions below send the wrong message to parties litigating under federal fee shifting statutes. The Ninth Circuit has held that it doesn't matter whether a prevailing plaintiff carries the burden of establishing the reasonable value of the legal services provided — even in a *Hensley* case where a significant portion of attorney time was spent on unsuccessful claims. If a plaintiff doesn't bother with contemporaneous time records — if a plaintiff ignores the district court's order to come forward with specific pieces of evidence to assist in the process of determining a reasonable fee — no matter. The district court will do the plaintiff's work for him or her. If the district court needs to spend weeks on the exercise, so be it. The plaintiff will get some "reasonable fee," regardless of whether it bears any relation to reality. In other words, notwithstanding this Court's direction (and the direction of every other federal appellate court) that the fee applicant bears the burden of proving a "reasonable" fee, a failure to shoulder that burden — or even to attempt to shoulder it — will not prevent a court-derived "reasonable fee" from being awarded.

CONCLUSION

Petitioner respectfully prays that this Court grant this petition for a writ of certiorari and thereby take the opportunity presented by this case to state clearly the consequences to a prevailing plaintiff who fails or refuses to produce contemporaneous, reasonably detailed time records, or to otherwise adduce reliable evidence in support of a fee application.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED SEPTEMBER 14, 1999

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 97-15404
D.C. No. CV-94-00433-WDB

BRENDA NORRIS,

Plaintiff-Appellee,

v.

SYSCO CORPORATION, a Texas corporation, and
ALLIED-SYSCO FOOD SERVICES, INC.,
a California corporation,

Defendant-Appellant.

No. 97-15447

BRENDA NORRIS,

Plaintiff-Appellant,

v.

SYSCO CORPORATION, a Texas corporation,

Defendant,

Appendix A

and

ALLIED-SYSCO FOOD SERVICES, INC.,
a California corporation,

Defendant-Appellee.

No. 97-16716

BRENDA NORRIS,

Plaintiff-Appellee,

v.

SYSCO CORPORATION, a Texas corporation,

Defendant,

and

ALLIED-SYSCO FOOD SERVICES, INC.,
a California corporation,

Defendant-Appellant.

OPINION

Appeals from the United States District Court
for the Northern District of California
Wayne D. Brazil, Magistrate Judge, Presiding

Appendix A

Argued and Submitted
July 12, 1999 — San Francisco, California

Filed September 14, 1999

Before: Charles Wiggins, Ferdinand F. Fernandez, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Fernandez

* * *

OPINION

FERNANDEZ, Circuit Judge:

Brenda Norris brought this action against Allied-Sysco Food Services, Inc. She alleged that, among other things, she had been subjected to discrimination in violation of Title VII, 42 U.S.C. §§ 2000e-2000e-15, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. After the jury rendered a verdict with special interrogatories, the district court entered judgment against Allied. Allied now appeals on grounds that the district court erred in failing to grant it judgment as a matter of law or a new trial,[1] and also erroneously granted attorney's fees against it. For her part, Norris appeals the district court's decision to exclude certain evidence. We affirm.

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1. *See Norris v. Allied-Sysco Food Servs., Inc.*, 948 F. Supp. 1418 (N.D. Cal. 1996) (*Norris I*).

Appendix A

BACKGROUND

Norris was employed by Allied as a non-foods specialist. That was a traveling sales position in which she was required to assist Allied's marketing associates in selling food related supplies and equipment, a job that necessitated driving long distances and occasionally lifting and moving heavy objects.

Working for Allied was never a picnic because the company did engage in practices that unlawfully discriminated against women, or at least the Department of Labor's Office of Federal Contract Compliance Programs was led to believe so. Allied settled that matter by, among other things, offering Norris a promotion to a higher position. At any rate, the jury determined that Allied had, nevertheless, discriminated against her by failing to promote her because she was a woman. That determination is not questioned on appeal. Unfortunately for Norris, the jury also determined that Allied would have failed to promote her even if it had no discriminatory motive. In short, it accepted Allied's mixed motive defense.[2] But that was not the full extent of her problems with Allied which, it seems, did not fully understand its ADA obligations either.

In September of 1994 Norris injured her back on the job, and the very next month she broke her knee in a fall that was not related to her job. She underwent surgery on her

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2. The jury held against Norris on her claim that she had been subjected to a hostile work environment based upon sexual harassment. She claims that the exclusion of evidence regarding an attempted rape of another employee was improperly excluded and, thus, prejudiced her case on the harassment claim.

knee in November of 1994, and ultimately underwent back surgery in April of 1996. Norris left work on a disability leave in September of 1994. She periodically submitted notes to Allied from her physician which stated that she would not be able to return to work for some time into the future; the period varied from several weeks to two months. However, while on leave she did contact Allied for the purpose of discovering what options or programs it afforded to aid disabled employees, and she also asked about returning to work with accommodations of some kind. She believed that she could return to work, if her driving and other duties were limited in some way. Allied did not really respond to those overtures or take any steps to offer any possible accommodations. In fact, it had a policy which indicated that a person could only return to work if an unrestricted work release from Allied's designated industrial specialists was obtained. Although the policy was not quite as rigid as it looked on paper, it did exist.[3] The jury was satisfied that Allied had not offered Norris a reasonable accommodation, even though she had requested it.

Intertwined with all of the other events were Norris' applications for and receipt of disability benefits under California's State Disability Insurance at first, and then under Allied's private long-term disability plan, which was insured by Principal Mutual Life Insurance. The application for benefits forms submitted to the insurers indicated that Norris was disabled from doing her own job and any other job, but she, and her physician, have explained that they took all of

---

3. Were it regularly enforced, it would likely be an ADA violation. *See McGregor v. National R.R. Passenger Corp.*, 176 F.3d 1249, 1252-53 (9th Cir. 1999).

that to mean that she could not engage in her regular occupation at that time. Their position was that Norris could have returned to work had some reasonable accommodation been offered to her. Again, the jury agreed that none was and found that Allied was at fault.

On the basis of the jury's ADA determination, judgment in the amount of $300,000 was entered against Allied, and the district court further undertook to award attorney's fees to Norris on both the Title VII claim and the ADA claim. In ill-prepared requests, Norris asked that those fees be set at $658,075.

The district court was quite dissatisfied with the form of the requests, which it dubbed as inadequate and, in various ways, excessive, duplicative, based on improperly maintained records, not always based on contemporaneously maintained records, and patently unreasonable. Nevertheless, it was apparent to the court that a good deal of valid work had gone into this hard fought case, and by devoting a great deal of its own time to the determination of fees, while drawing on its own extensive experience and the information that was properly before it, the court determined that fees should be awarded in the amount of $247,840. The court, incidently, also reduced Norris' costs and expense request from $58,795.82 to $24,107.63.

These appeals by both Allied and Norris followed.

Appendix A

JURISDICTION AND STANDARDS OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review a district court's determination regarding a claim that the jury's verdict is internally inconsistent de novo. *See Wilks v. Reyes*, 5 F.3d 412, 415 (9th Cir. 1993). That is to say, we must decide for ourselves whether the jury's responses to special interrogatories can be harmonized or whether they are so inconsistent that the verdict should be disregarded and the case remanded for a new trial. *See Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119, 83 S. Ct. 659, 666, 9 L. Ed. 2d 618 (1963).

We generally review orders awarding attorney's fees for abuse of discretion. *See Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 1941, 76 L. Ed. 2d 40 (1983); *Hall v. Bolger*, 768 F.2d 1148, 1150 (9th Cir. 1985). "However, we review *de novo* any elements of legal analysis which figure in the district court's decision." *Corder v. Gates*, 104 F.3d 247, 249 (9th Cir. 1996); *Hall*, 768 F.2d at 1150. We review the district court's evidentiary determinations, including those under Federal Evidence Rule 403, for abuse of discretion. *See Masson v. New Yorker Magazine, Inc.*, 85 F.3d 1394, 1399 (9th Cir. 1996); *Coursen v. A.H. Robins Co., Inc.*, 764 F.2d 1329, 1333 (9th Cir. 1985).

DISCUSSION

In the principal appeal in this case, Allied strikes out at the judgment against it on two major grounds. It did manage

to avoid most of Norris' allonges, but its parries were insufficient to ward off her ADA thrust. It seeks to eliminate the touch of that thrust by asserting that it was actually a foul (the jury's answers were inconsistent) and that she should not have been able to make the thrust in the first place (judicial estoppel or other preclusion). In a separate appeal, it also attacks the attorney's fees which followed that touch and the graze it suffered from the deflected touch of her gender discrimination claim. We consider each of Allied's assertions in turn.

A. *The Jury's Inconsistent Positions*

Allied earnestly claims that pursuant to Federal Rule of Civil Procedure 50 it should have been granted judgment as a matter of law, or at least a new trial, because there was a fatal inconsistency in the jury's answers to special interrogatories presented to it.[4] We disagree.

It is certainly true that "[i]f a jury answers special interrogatories and the answers cannot be reconciled, a new trial must be granted." *Tanno v. S.S. President Madison Ves*, 830 F.2d 991, 992 (9th Cir. 1987). But it is also true that we do not find inconsistency lightly. Rather:

> We are bound to find the special verdicts consistent if we can do so under a fair reading of them. When faced with a claim that verdicts are inconsistent, the court must search for a reasonable way to read the verdicts as expressing

4. *See Norris I*, 948 F. Supp. at 1434-40.

> a coherent view of the case, and must exhaust this effort before it is free to disregard the jury's verdict and remand the case for a new trial.

Toner v. Lederle Labs., 828 F.2d 510, 512 (9th Cir. 1987) (citations omitted).

In this case, the district court took that injunction seriously, as do we. When the jury's responses are vetted in that way, we, like the district court, are satisfied that the jury could reasonably have decided that in light of the demonstrated policies of Allied, a company which had a rather poor grasp on its ADA obligations, there was no precise refusal to reinstate Norris.[5] At the same time, it could reasonably have decided that there was no offer of a reasonable accommodation to her, even though she requested accommodation.[6] This was a careful, even meticulous, jury

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5. Special Interrogatory 24 asked: "Did Ms. Norris prove by a preponderance of the evidence that after she began her disability leave but before she was terminated she sought to begin working again and that Allied-Sysco refused to permit her to begin working again?" The jury answered, no.

6. Special Interrogatory 34 asked: "Did Ms. Norris prove by a preponderance of the evidence that Allied-Sysco violated the Americans with Disabilities Act by terminating her?" It went on to explain that the jury should answer "yes" if it found certain elements. Those were: (1) that she was a qualified individual with a disability; (2) that she would have been able to perform the essential functions of her position with reasonable accommodation; (3) that she requested reasonable accommodation from Allied-Sysco, or that Allied-Sysco knew or reasonably should have known that she wanted

(Cont'd)

which deliberated for seven days and then answered a list of 42 complex interrogatories in a developing area of the law. We are satisfied that the district court's reading of the interrogatory answers was eminently reasonable. That is, while Allied did not absolutely directly refuse to reinstate Norris, it did not offer to accommodate her either. In short, the answers were reconcilable.[7]

B. *Norris' Inconsistent Positions*

Allied asserts that Norris should have been precluded from pursuing her ADA claim before the jury because she applied for and accepted total disability benefits from its group disability insurance carrier, and also received disability benefits from the state. The district court declined to apply judicial estoppel for a myriad of reasons. *See Norris I*, 948 F. Supp. at 1440-49. That decision was made before the Supreme Court's recent ruling on the issue. *See Cleveland v. Policy Management Sys. Corp.*, __ U.S. __, 119 S. Ct. 1597, __ L. Ed. 2d __ (1999). The Supreme Court emphasized the fact that an ADA claim of ability to work with

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(Cont'd)

to resume working with a reasonable accommodation; (4) that Allied-Sysco could have reasonably accommodated her, without undue hardship; (5) that Allied-Sysco did not offer her a reasonable accommodation; and (6) that Ms. Norris' disability was a motivating factor in Allied-Sysco's decision to terminate her. The jury answered, yes.

7. The above being so, we need not, and do not, opine upon the district court's alternate rationales for upholding the jury's decision. *See Norris I*, 948 F. Supp. at 1436-40.

accommodation does not necessarily clash with a disability claim assertion (there Social Security Disability Insurance) of inability to do substantial gainful work in the national economy. *See id.* at __, 119 S. Ct. at 1601-03; *see also Fredenburg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1178 (9th Cir. 1999); *Johnson v. Oregon*, 141 F.3d 1361, 1366 (9th Cir. 1998). The Court, therefore, rejected the use of judicial estoppel, and declared that ADA cases should be treated like other cases where factual contradictions are alleged to exist. *See Cleveland*, __ U.S. at __, 119 S. Ct. at 1601-03. That is, in light of the prior statements made by a plaintiff when he was seeking disability benefits, could a reasonable juror find in his favor on his ADA claim? *See id.* at __, 119 S. Ct. at 1604; *see also Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481-82 (9th Cir. 1996). That, of course, is the summary judgment standard; it is also the standard for a judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986).

Even after a full blown trial on the merits, the record in this case does not demonstrate that the definition of disability under the ADA and the definitions under the insured disability plan (and state disability plan) were so congruent that Norris is guilty of a degree of mendacity which requires that a judgment as a matter of law should have been entered against her. Nor is the record devoid of explanations for any inconsistencies. Beyond that, proof that a party, like Norris, has made prior inconsistent statements is not a rare event in our courts. Juries are regularly called upon to consider evidence of that sort, and we all know that prior inconsistency does not inexorably lead to defeat. Moreover, it is well known

that "the nature of an individual's disability may change over time." *Cleveland*, __ U.S. at __, 119 S. Ct. at 1603. The healing process is often both manifest and marvelous.

We, like the district court and like other courts before us, do feel some discomfort about the seemingly inconsistent representations about facts which regularly show up in this area of the law and enable a claimant to first obtain one recovery and then still another one. We are not insouciant about Allied's claim that it seems somewhat unfair to have it first pay benefits to Norris through its insurer on the theory that she was disabled from working, and then be forced to pay damages because, for ADA purposes, she was not so disabled that she was unable to work with accommodation. Perhaps the result here partly reflects some lack in Allied's presentation of its theories and evidence to the jury at a time when disability doctrinal development is in its infancy. Perhaps it partly reflects the jury's understanding about the problems and dilemmas faced by injured workers as they confront myriads of forms, demands, concepts and needs. *See Fredenburg*, 172 F.3d at 1179-80. At any rate, we are not able to say that the district court erred when, upon its perusal of this record, it decided that assessment of Norris' disparate positions should be consigned to the guided common sense of the jury rather than to the conscience of the bench.[8]

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8. In light of *Cleveland*, we do not adopt the district court's extensive reflections and comments upon the doctrine of judicial estoppel and its explanations of why the doctrine was not applied in this case. *See Norris I*, 948 F. Supp. at 1440-49.

C. *Attorney's Fee Award*

The district court determined that Norris was entitled to recover attorney's fees from Allied on both her ADA claim[9] and her Title VII,[10] gender discrimination, claim. Allied attacks the award of fees on the latter claim in principle because Norris obtained no relief whatever on that claim. It attacks the award on both claims on the theory that Norris made an insufficient showing to support her attorney's fee demand.

(1) *Title VII Fees*

If Allied is correct about the Title VII portion of the fees, we must set aside the whole fee award without regard to details of proof regarding the proper amount. Therefore, we consider that sortie first.

Although the jury was satisfied that Allied had committed an act of gender discrimination against Norris because her gender was a factor in its failure to promote her, it also determined that due to other considerations Allied would not have promoted her anyway. In other words, Allied established a defense to the charges against it, and Norris was not entitled to any damages whatsoever. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 242-47, 109 S. Ct. 1775, 1786-89, 104 L. Ed. 2d 268 (1989). Because she did not seek other forms of relief, she obtained no actual relief

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9. 42 U.S.C. § 2000e-5(g)(2)(B).

10. 42 U.S.C. § 12205.

for herself under the circumstances. In most of the legal world, that would indicate, without further ado, that Norris could not obtain attorney's fees because those are normally awarded to the prevailing party, if, indeed, they are awarded at all. *See, e.g.*, 42 U.S.C. § 1988; *Farrar v. Hobby*, 506 U.S. 103, 114-16, 113 S. Ct. 566, 574-75, 121 L. Ed. 2d 494 (1992). Not so in this area; Congress has decreed otherwise. That decree is found in 42 U.S.C. § 2000e-5(g)(2)(B), which states, in pertinent part:

> On a claim in which an individual proves a violation under section 2000e-2(m) [improper mixed motive action] of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court —
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . . .

That, of course, means that even though the employer has a defense to damage liability, the somewhat wronged employee may recover attorney's fees. *See Lam v. University of Hawaii*, 40 F.3d 1551, 1564 n. 24 (9th Cir. 1994); *see also O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 761 (9th Cir. 1996).

So much, then, is clear. But, Allied argues, where a plaintiff recovers nothing at all, the attorney's fee must still be proportional, and that means, it says, that the only correct proportion would be zero. For that proposition it points to *Farrar*. Its attack is not without force, but, ultimately, it cannot prevail and it is driven back upon its own bulwarks.

In *Farrar*, the Supreme Court was considering a claim to attorney's fees under 42 U.S.C. § 1988, and it declared that, "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is *usually* no fee at all." *Farrar*, 506 U.S. at 115, 113 S. Ct. at 575 (citation omitted and emphasis added). Justice O'Connor, who was one of the five justices in the majority, put it a little less stringently in her concurring opinion, and rather underscored the word "usually" by making it clear that even a nominal damage award might be more than technical or de minimis where, for example, the legal issue was significant or some public goal was accomplished. *See id.* at 120-22, 113 S. Ct. at 578-79 (O'Connor, J., concurring). That is to say, her "usual" may not be quite as usual as that of the other Justices in the majority. Still, the need for some sort of proportionality between the success of the plaintiff and the fees awarded was agreed to, and that is what presents the difficulty here. How is proportion to be considered, when the plaintiff has recovered nothing at all, but Congress has given courts discretion to award fees anyway? If taken literally, any attempt at a proportion will yield an infinitely wrong answer when the remedy received is zero. But Congress cannot have intended to be that literal. The difficulty presented has been struggled with and resolved by other Circuits.

The best discussion of the problem is found in a Fourth Circuit case. *See Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332 (4th Cir. 1996). There, as here, the plaintiff did show a Title VII violation, which infected her layoff, but she would have been laid off anyway. *See id.* at 1334. Thus, she received no damage award, but the district court did give her declaratory relief and attorney's fees. *See id.* The district court had been under the impression that it was required to award attorney's fees to Sheppard, but the court of appeals pointed out that Congress said "may" not "shall," which indicated that the court had discretion under the circumstances. *See id.* at 1335. It noted that courts should "consider the relationship between the fees and the degree of the plaintiff's success." *Id.* at 1336. However, it recognized that, "simply comparing the extent of damage recovery with the attorney's fees would amount to an empty exercise." *Id.* On the other hand, the court doubted the efficacy of primarily benefitting lawyers where "relief to the plaintiff is otherwise trivial and the lawsuit promotes few public goals." *Id.* It continued: "Factoring proportionality concerns into the analysis helps guard against this result." *Id.* Thus, it said, courts should consider such factors as why other relief was not awarded, what public purposes where served, how ubiquitous and wrongful the defendant's conduct was, and the strength of the discriminatory motive and other motives — such as unsatisfactory actions of the employee — in influencing the termination decision, even though both played a part in it. *See id.* at 1336-39. In a word, it held that the district court does have discretion in determining whether, and how large, an attorney's fee should be awarded. *See id.* at 1339; *see also Hensley*, 461 U.S. at 437, 103 S. Ct. at 1941.

Other courts have adopted the same position. *See Akrabawi v. Carnes Co.*, 152 F.3d 688, 695-697 (7th Cir. 1998); *Canup v. Chipman-Union, Inc.*, 123 F.3d 1440, 1443-44 (11th Cir. 1997). One Court of Appeals has disagreed with *Sheppard*, but seems to have read that case to mean that only a nominal fee recovery will be allowed when a plaintiff does not obtain damages or an injunction in a mixed motive case. *See Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074, 1080 (10th Cir. 1998). We think that somewhat mistakes the *Sheppard* approach, which we have already outlined. But *Gudenkauf* does seem to go somewhat further when it declares that even in the face of nominal, de minimis, or no, relief a plaintiff should "ordinarily" recover fees. *Id.* at 1081. While that might most often turn out to be the result over time, we see no cause to cabin the district court's ability to assess the whole situation before it in each instance. Thus, while we agree that Congress's determination to allow fees in the absence of a damage award suggests that damages will not be the fulcrum upon which an attorney's fee award usually turns, that does not mean that there can be no fulcrum whatsoever. Perhaps in the long run, *Gudenkauf's* "ordinarily" will rarely yield a result different from *Sheppard's* "proportionality," but to the extent it would, we are satisfied that *Sheppard* states the correct rule. Its approach is faithful to the concerns of both the Supreme Court and Congress.

In the case at hand, the district court thoroughly discussed the issues and did recognize that it had discretion. While it, too, rejected what it mistook as *Sheppard's* connection of damages to fees, that did not, as we read its decision, dissuade it from considering all of the factors that

Sheppard thought appropriate under the circumstances. As long as all facets of a case are considered, the result can be little or no fees under any proper approach, including that of the district court.

In fine, the district court did exercise the kind of broad discretion that is appropriate in this type of case, and did not abuse that discretion when it determined that some fee should be awarded. We do not discuss the precise elements mentioned by the district court because we have no wish to, inadvertently or otherwise, ossify this area by enshrining a list of items to be considered when plaintiffs go shopping for fees. The considerations mentioned by the Fourth Circuit are useful and were touched upon by the district court, but, again, they are neither comprehensive, nor exclusive, nor required in every case. Suffice it to say that, contrary to Allied's position, the mere fact that Norris did not obtain actual tangible relief does not preclude an award of fees to her.

(2) *The Overall Fees*

Allied then sallies forth to attack the whole of the fee award because Norris presented exceedingly poor records to the district court in her attempt to recover those fees. Or perhaps we should say that her attorney kept exceedingly poor records to support her attempt to recover fees for him. *Cf. United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equip., Inc.*, 89 F.3d 574, 576-79 (9th Cir. 1996).

It is the obligation of the party who seeks fees to document "the appropriate hours expended and hourly rates,"

and he "should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *Hensley*, 461 U.S. at 437; 103 S. Ct. at 1941; *see also Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992). The deficient presentation by Norris might well have justified the district court in throwing up its hands and refusing to award any fees whatsoever. *See, e.g., Vocca v. Playboy Hotel of Chicago, Inc.*, 686 F.2d 605, 606-08 (7th Cir. 1982); *see also Carreathers v. Alexander*, 587 F.2d 1046, 1052 (10th Cir. 1978); *Pearson v. Western Elec. Co.*, 542 F.2d 1150, 1153 (10th Cir. 1976); *Keener v. Department of the Army*, 136 F.R.D. 140, 147-49 (M.D. Tenn. 1991). Especially is that true where the district court's request for further specific information went unheeded.

Nevertheless, the district court did not take that approach. It, instead, expended "[a]pproximately ten days of person-power . . . in a studied effort to analyze, parse, categorize, evaluate and allocate" hours, all for naught. And it appears that because the court's efforts continued, it must have expended a great deal of time after that considering the information counsel presented and the record so that it could decide upon the appropriateness of an award. We see no need for such a large expenditure of judicial resources in the face of such a miserable presentation by a plaintiff's attorney, and surely this opinion should not be read as encouraging attorneys to keep sloppy records or judges to immolate themselves on a pyre of unhelpful computer printouts. On the other hand, we see no abuse of discretion when a district court decides to struggle with the record and the issues as the court did here. *Cf. In re Washington Public Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305-06 (9th Cir. 1994).

As it is, this is not a case where we are presented with a landscape without a road map. *See Schwarz v. Secretary of Health & Human Servs.*, 73 F.3d 895, 906 (9th Cir. 1995); *cf. McGrath v. County of Nevada*, 67 F.3d 248, 254-55 (9th Cir. 1995); *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1213 (9th Cir. 1986). On the contrary, the district court carefully and meticulously explained its methodology and its reasons for making the adjustments and the award it did. We cannot say that it abused its discretion in setting the fees.

CONCLUSION

The district court lavished a great deal of time and attention on this case. Alas, neither party was satisfied. Nevertheless, no bevue detracts from the result of the court's efforts. It did not err when it excluded certain evidence,[11] refused to apply judicial estoppel, harmonized the jury's answers to interrogatories, and fixed attorney's fees.

AFFIRMED. Norris shall recover her costs on appeal.

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11. Norris' assertion that the district court should not have excluded evidence of an alleged attempted rape of a female employee by a coworker is without merit. Despite the fact that the evidence had some relevance to her claim, the district court did not err in determining that the relevance was outweighed by the danger of undue waste of trial time, unfair prejudice and confusion of the issues. *See* Fed. R. Evid. 403.

APPENDIX B — ORDER AND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA RE PLAINTIFF'S PETITION FOR ATTORNEY'S FEES AND EXPENSES DATED AND FILED AUGUST 6, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C94-0433 WDB

BRENDA NORRIS,

Plaintiff,

v.

SYSCO CORPORATION, a Texas corporation, and ALLIED-SYSCO FOOD SERVICES, INC., a California corporation,

Defendant(s).

ORDER AND MEMORANDUM OPINION RE PLAINTIFF'S PETITION FOR ATTORNEY'S FEES AND EXPENSES

I. INTRODUCTION

Through this Opinion and Order we respond to plaintiff's petition for attorney's fees, litigation expenses and costs. Before setting forth in detail the legal and evidentiary bases for our disposition of this petition, it is important to provide

an overview of the litigation and of the difficulties that we have faced because of the way plaintiff's counsel, Daniel Bacon, chose to keep his records and to litigate the fee and expense issues.

Having lived with this case for upwards of two years now, and having devoted many hours to studying the papers submitted by both parties on the fee issues, we have concluded that the following general characterizations of the action are accurate. The case is best understood as divisible into two major segments. The first segment covers the period from February 7, 1994, the date of filing of the initial complaint ("Original Complaint") against Allied-Sysco Food Services, Incorporated ("Allied") and Allied's parent, Sysco Corporation ("Sysco") up to the time Allied terminated Ms. Norris, effective December 1, 1995. The second major segment of the case covers the period from that termination through the end of the trial in October of 1996.

As initially pled, the case included allegations of sexual harassment; discrimination based on gender and age; violations of the Equal Pay Act ("EPA"); retaliation — for cooperating with the Office of Federal Contract Compliance Programs' ("OFCCP") investigation into Allied's employment practices and for complaining about sexual harassment, and gender and age discrimination; fraud; negligent misrepresentation; and both intentional and negligent infliction of emotional distress. The Equal Pay Act claim eventually was dropped — because, during the first segment of the case, Allied agreed, as part of a negotiated disposition of a much broader inquiry by the OFCCP, to make retroactive adjustments in Ms. Norris' compensation and job

classification. *See* the December 1994 Conciliation Agreement between Allied and OFCCP ("Conciliation Agreement"). Apart from the EPA claim, the primary focus of the lawyering activity during the first stage of the case was on Ms. Norris' allegations that she had been unlawfully denied promotions and promotional opportunities based on her gender and that she had been the victim of sexual harassment and retaliation. It was to these kinds of claims that most, but by no means all, of the work by plaintiff's counsel was devoted during the first segment of the case.

The second stage of the case commenced with plaintiff's termination. After Allied's decision to end the employment relationship, plaintiff began developing claims based on the Americans with Disabilities Act ("ADA"). She asserted that Allied had committed two violations of the ADA: first, by not reasonably accommodating her medical conditions during the period before her termination and, second, in the act of terminating her. In April 1996, when she filed her First Amended and Supplemental Complaint ("Amended Complaint"), plaintiff formally added these ADA claims to the causes of action she had pled initially. Her Amended Complaint also added allegations that the defendants had harassed and discriminated against her on the basis of her religion — but these claims were never the subject of substantial litigation activity. Thus, in the second stage of the litigation, the lawyering effort had two primary focuses: (1) the allegations of discrimination and harassment based on plaintiff's gender, along with the allegations of retaliation, and (2) the allegations that Allied had violated the ADA.

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The evidentiary underpinnings for the allegations that Allied or its corporate parent discriminated against or harassed Ms. Norris on the basis of either her age or her religion remained thin throughout the litigation — and while plaintiff tried to develop these claims, they were never the subject of extensive lawyering activity.

Several of the claims that plaintiff pled (in both the Original and Amended Complaint) were, in essence, legally duplicative of other causes of action. The claims that sounded formally in breach of contract, breach of the covenant of good faith and fair dealing, negligent and intentional infliction of emotional distress, and violation of the California Constitution and California public policy had no viability independent of the claims that defendants had discriminated on the basis of gender, age, or religion, had subjected plaintiff to discriminatory and/or harassing treatment based on her gender, her age, or her religion, or the claims that defendants had retaliated against plaintiff because she complained about discriminatory or harassing conduct and/or because she cooperated with the federal investigators. Because the viability of each of these legal theories turned, for the most part, on whether plaintiff's counsel could develop evidence sufficient to support a claim of discrimination or harassment based on gender, age, or religion, or sufficient to support a claim of retaliation, plaintiff was not required, by the presence of these extra legal theories, to engage in substantial investigative or discovery work that she would not have been required to do under the other claims that were more directly based on allegations of discrimination, harassment, or retaliation. These extra legal theories did require counsel to do some pleading and motion

work, however, that would not have been necessary had these essentially duplicative theories not been pled.

In contrast, the claims that sounded in fraud and negligent misrepresentation were not essentially duplicative of plaintiff's discrimination, harassment and retaliation claims. While proof of discrimination, harassment, or retaliation was essential to the viability of both of these theories, such proof would by no means have been sufficient to support recovery under either theory. To recover for fraud or negligent misrepresentation, plaintiff would have been required to make a substantial additional showing: either of negligence (at the time of and in making the misrepresentations) or of knowing misrepresentation with intent to induce reliance (as well as reliance in fact). Thus the presence of these two theories required not only additional pleading and motion work, but also investigation and discovery into matters that plaintiff would not have been constrained to develop if she had not tried to use these norms as separate bases for recovery.

Plaintiff pressed all of her various claims against both Allied and its corporate parent, Sysco. Counsel for plaintiff devoted fairly substantial resources to trying to generate evidence that would make Sysco responsible, under the law, for the mistreatment that plaintiff allegedly suffered directly at the hands of Allied. In the end, these efforts were unsuccessful: near the close of the pretrial period, the Court granted Sysco's motion for summary judgment, concluding that plaintiff had clearly failed to establish an evidentiary basis for imposing liability on the corporate parent.

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By the time the case went to the jury some of the claims had been merged, some had been dropped by plaintiff, and some had been dismissed by the Court. The jury, through Special Interrogatories, addressed claims based on allegations that Allied (1) discriminated against plaintiff on the basis of her gender in its promotion decisions; (2) discriminated against plaintiff on the basis of her age in its promotion decisions; (3) retaliated against plaintiff by not promoting her; (4) transferred plaintiff, for discriminatory or retaliatory reasons, to a less desirable territory; (5) subjected plaintiff to a hostile work environment based on sexual harassment; (6) subjected her to a hostile work environment in retaliation for her complaining about discrimination or harassment; (7) refused, because of her gender or in order to retaliate against her, to permit her to return to work after she began her disability leave but before she was terminated; (8) violated the ADA by refusing to permit her to return to work after she began her disability leave but before she was terminated; (9) terminated plaintiff on the basis of her gender; (10) terminated her in order to retaliate against her for complaining about discrimination or harassment or for filing the instant lawsuit; (11) violated the ADA in terminating her; (12) committed fraud against her; (13) intentionally inflicted emotional distress on her; and (14) acted with a sufficiently culpable mental state to justify imposition of punitive damages.

The jury ruled against Ms. Norris on the vast majority of these claims. It found that she had proved that Allied violated the ADA when it terminated her and that she suffered $300,000 in emotional distress damages as a result of that termination. The jury also found that Ms. Norris had proved

that her gender was a motivating factor in a decision or decisions by Allied not to promote her, but the jury went on to find that Allied had proved that, based on lawful considerations, it would have decided not to promote her even if her gender had not been a factor. Ms. Norris was unsuccessful on all of her other claims.

Following the jury verdict, on December 20, 1996, plaintiff filed her petition for reimbursement of attorney's fees and costs ("Petition"), in which she asked the Court for an award of $751,870.82.[1] Although plaintiff received relief only on her claim that Allied terminated her in violation of the ADA, she seeks reimbursement of *all* fees and costs incurred in this action. Moreover, despite the fact that since the Supreme Court's 1983 decision in *Hensley v. Eckerhart*, 461 U.S. 424, plaintiff's counsel has been on notice of his obligation to document his billing in a manner that will permit the Court to identify the nature and subject matter of the tasks performed in connection with his client's case and the number of hours expended thereon, the majority of counsel's documentation describes his efforts in only the most general terms, without identifying the claims to which his work pertains or the number of hours expended on each task performed. These inadequacies in counsel's documentation are described more specifically in section III, *infra*.

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1. In response to objections by Allied, plaintiff has withdrawn certain billing statement entries, that, by the Court's calculations, total $34,875.00. Accordingly, plaintiff's submission now totals $716,995.82.

Appendix B

II. LEGAL PRINCIPLES GUIDING THE COURT

Plaintiff is the prevailing party on her claim that Allied terminated her in violation of the ADA. Under 42 U.S.C. §12205 she is entitled to reasonable attorney's fees incurred in connection with that claim.[2] Plaintiff also proved that Allied unlawfully considered gender as a factor when Allied denied plaintiff one or more promotions, thus, violating 42 U.S.C. §2000e-2(m). Under 42 U.S.C. §2000e-5(g)(2)(B), the Court may, in its discretion, grant plaintiff the reasonable attorney's fees and costs she demonstrates were "directly attributable only to" her pursuit of that claim. 42 U.S.C. §2000e- 5(g)(2)(B). Despite the limited nature of her success, plaintiff seeks reimbursement for all fees incurred in this action. Defendant, not surprisingly, objects to a complete recovery of fees, arguing that Mr. Bacon expended significant time on distinct and unsuccessful claims for which plaintiff is not entitled to fees and that Mr. Bacon's time expenditures were frequently unreasonable.[3]

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2. "In any action . . . commenced pursuant to this chapter, the court . . . , in its discretion, may allow the prevailing party, . . . , a reasonable attorney's fee, including litigation expenses, and costs, . . ." The Court is to adopt the powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9. 42 U.S.C. §12117(a). Many of the cases cited herein arise from 42 U.S.C. §1988. The standards set forth in such cases are "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party' [*e.g.*, §§1988, 2000e-5(k), and 12205]." *Hensley*, 461 U.S. at 433 n.7. All section references herein are to Title 42 unless otherwise stated.

3. Defendant does not dispute that plaintiff, as a prevailing party at this juncture, would be entitled to fees for her claim that

(Cont'd)

The Court must (1) segregate work performed by plaintiff's counsel that is compensable under 42 U.S.C. §§12205 or 2000e-5(g)(2)(B) from that which is not compensable under those statutes; (2) eliminate from the compensable work the hours that are duplicative, excessive, or otherwise unnecessary; (3) determine whether, in light of plaintiff's limited success, the fee award should be further reduced; and (4) fix an hourly rate that is appropriate for the work done by plaintiff's counsel. We discuss the legal principles that guide our analysis below.

A. *Segregating Compensable Work From Work that is Not Compensable*

Under controlling authority, it is clear that plaintiff may not recover fees for hours expended in connection with unsuccessful claims that are unrelated to the claims on which she prevailed. *Hensley*, 461 U.S. 424. Because plaintiff has achieved only limited success, the Court must conduct a two-part analysis:

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Allied terminated her in violation of the ADA, nor that it is within the Court's discretion to award fees that are directly attributable only to her claim that Allied considered gender in its decisions not to promote her. Accordingly, it is not necessary for the Court to discuss plaintiff's status as a "prevailing party" at length. Plaintiff is a prevailing party on her claim that Allied terminated her in violation of the ADA because judgment has been entered in her favor and there has been a material alteration of the relationship between her and the defendant. *Farrar v. Hobby*, 506 U.S. 103 (1992). In addition, plaintiff proved a violation under §2000e-2(m), entitling her to have the Court consider her request for reimbursement of the fees incurred in furtherance of that claim. §2000e-5(g)(2)(B).

> First, the court asks whether the claims upon which the plaintiff failed to prevail were related to plaintiff's successful claims. If unrelated, the final fee award may not include time expended on the unsuccessful claims. If the unsuccessful and successful claims are related, then the court must apply the second part of the analysis, in which the court evaluates the "significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."

Schwarz v. Secretary of Health and Human Services, 73 F.3d 895, 901-902 (9th Cir. 1995) (citations omitted).

As noted, the first part of this test requires the court to determine whether, for fee award purposes, the successful and the unsuccessful claims were sufficiently "related." But Congress has established two different standards for determining whether claims are "related" in the settings we confront here. A standard that is narrower (less generous to prevailing plaintiffs) applies when the authority to award fees derives only from 42 U.S.C. §2000e-5(g)(2)(B), *i.e.*, where the plaintiff has proved that the challenged decision by the defendant was infected by an unlawful discriminatory animus, but defendant has proved that, even absent that animus, other, legitimate considerations would have led the defendant to make the same decision anyway. In these so-called "mixed motive" settings, Congress permits a court to award fees to a prevailing party only for that work which she can prove was "directly attributable only to" her pursuit of the claim in which she proved that an unlawful animus infected the defendant's challenged decision.

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A broader standard (more generous to prevailing plaintiffs) applies when the source of authority to award fees is not the "mixed motive" amendment to Title VII, but is the older and more generally applicable provisions of 42 U.S.C. §2000e-5(k) and 42 U.S.C. §1988. Those more liberal provisions apply when we are determining which claims are "related" to the ADA claim on which plaintiff prevailed. *See*, ADA, 42 U.S.C. §12205, using same language as §2000e-5(k), and §12117(a) directing courts to adopt the procedures set forth in §2000e-5(k). But the narrower, more demanding standard applies when we are determining which claims are "related" (for fee shifting purposes) to the claim that plaintiff's gender was a substantial factor in Allied's decisions not to promote plaintiff.

1. ***Work that is "Related to" Plaintiff's Successful ADA Claim***

While the courts have not developed a definitive set of criteria that is always applicable to determine "relatedness" in this context, we read the authorities to provide three overlapping guidelines. The Court should consider (1) whether the successful and unsuccessful claims involve a common core of facts; (2) whether the successful and unsuccessful claims are premised on related legal theories; and (3) whether, viewed prospectively from the juncture at which the decisions were made, a *reasonable* lawyer litigating only the successful claim (that Allied violated the ADA when it terminated plaintiff) could have decided that it was appropriate to perform the work for which reimbursement is sought. *Hensley*, 461 U.S. at 434-435 (claims related if "involve a common core of facts or [are]

based on related legal theories;" and court to analyze billing statement as if successful and unsuccessful claims had been litigated in separate lawsuits); *see also Schultz v. Hembree*, 975 F.2d 572 (9th Cir. 1992).

The Ninth Circuit has articulated various approaches for determining whether plaintiff's successful and unsuccessful claims involve sufficiently common factual and legal bases. *Schwarz*, 73 F.3d 895, 903-904. These articulations provide a fluid set of inquiries that enable the Court to conceptualize "relatedness" in practical terms. The Court may consider whether the successful and unsuccessful claims were intended to remedy the same "course of conduct" or one that is "entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised." *Schwarz*, 73 F.3d at 903 *quoting Thorne v. City of El Segundo*, 802 F.2d 1131, 1141 (9th Cir. 1986). To determine whether plaintiff's claims relate to the same course of conduct the Court may ask (1) whether the claims were premised on the same set of circumstances; (2) whether the claims "required virtually the same evidence"; (3) whether discovery conducted on unsuccessful claims also helped develop the successful claims; and (4) whether the same or different people were the "prime perpetrators." *Schwarz*, 73 F.3d at 903-904. More generally, our Court of Appeals has directed us to consider whether any of the work performed in connection with unsuccessful claims contributed to the successful claims and, thus, to the "ultimate victory of the lawsuit." *Schwarz*, 73 F.3d at 903 *citing Herrington v. County of Sonoma*, 883 F.2d 739 (9th Cir. 1989) and *quoting Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1052 (9th Cir. 1991).

It is clear, under all of these formulations, that the broader approach to determining "relatedness" that is applicable to Ms. Norris' ADA claim compels courts to resolve *reasonable* doubts in favor of the prevailing party — by recognizing that there is a fairly substantial zone or range of decisions that litigation counsel can appropriately make when determining, without the benefit of hindsight, how best to develop the case for their client.

2. *Work that is "Directly Attributable Only to" Plaintiff's Successful Gender Discrimination Claim*

As indicated above, Congress has imposed a mere demanding standard on plaintiffs in mixed motive cases whose request for fees can be premised only on section 2000e-5(g)(2)(B). In this statute Congress chose not to incorporate the well-understood and long-used language of section 1988. Instead, Congress self-consciously articulated the permissible reach of the fee shifting authority in clearly narrower language: under this relatively recent provision, courts may award fees only that plaintiff proves were "directly attributable only to the pursuit of" the claim based on the charge that discriminatory animus infected the challenged decision.[4]

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4. Not only does §2000e-5(g)(2)(B) employ stronger language than sections 12205, 1988, and 2000e-5(k), but also Congress amended §2000e-5 by adding subsection (g)(2)(B) in 1991, eight years after *Hensley*. The Court must presume that Congress was aware of the "relatedness" standard set forth in *Hensley* and its progeny and, therefore, that the distinction between the standards applicable to §§12205 and 2000e-5(g)(2)(B) was intended.

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Where the Court considers the factual and legal connection between the successful mixed motive claim and unsuccessful claims, the relation between the work performed and the development of plaintiff's claim that Allied considered gender in decisions not to promote her must be clear. Unlike the broader standard that applies to the successful ADA claim, where plaintiff only need show that a reasonable lawyer *could* have decided that it was appropriate to undertake the work in question in pursuit of the successful claim, under the narrower standard that applies when the basis for recovery is limited to the mixed motive statute the plaintiff must show that a reasonable lawyer *likely would have decided* that it was appropriate to undertake the work in question in pursuit of the claim that was based on the decision by the defendant that was infected by the unlawful animus. Stated differently, in a mixed motive case, the "grey zone" that represents the latitude the law allows for differing professional judgments is appreciably narrower than it is in cases where the plaintiff succeeded in proving not only wrongful conduct by the defendant but also a right to real-world relief. *E.g.*, *Gudenkauf v. Stauffer Communications, Inc.*, 953 F. Supp. 1237, 1242 (D. Kan. 1997) (work is "directly attributable" if it "cannot be reasonably disentangled from the work done on other discrimination claims which share a common core of facts").

B. *Elimination of Excessive, Duplicative, or Unnecessary Hours*

Once the Court has identified the tasks that are compensable, the Court must determine whether the number of hours expended on the compensable tasks was reasonable.

Davis v. City and County of San Francisco, 976 F.2d 1536, 1543 (9th Cir. 1992) ("touchstone in determining whether certain hours have been properly claimed is reasonableness") *vac'd in part as to different issue by* 984 F.2d 345 (9th Cir. 1993). The Court must not compensate plaintiff for hours that clearly exceed the amount of time a reasonably competent attorney would take to accomplish the particular task. *Dennis v. Chang*, 611 F.2d 1302, 1308 (9th Cir. 1980). Plaintiff's counsel must make a "good faith effort" to eliminate from the fee request hours that are "excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434; *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1993). The Court must eliminate from the fee request any excessive, duplicative or unnecessary hours not eliminated by counsel.

C. *Reduction of Plaintiff's Fee Award in Light of Her Degree of Success*

After determining the number of hours that are fairly attributable (under the two different standards) to the claims on which plaintiff prevailed, the Court must consider plaintiff's degree of success. *Schwarz*, 73 F.3d at 901-902. Where the plaintiff has achieved only limited success, *full* compensation even for hours reasonably attributable to prevailing claims may be excessive. *Schwarz*, 73 F.3d at 902. In fact, the Supreme Court has held that "the most critical factor in determining the reasonableness of a fee award is the degree of success." *Farrar v. Hobby*, 506 U.S. 103, 114-115 (1992) (internal quotations omitted); *Hensley*, 461 U.S. at 440 (degree of success is "crucial" factor). *Farrar* directs the Court "to give primary consideration to" the

magnitude of plaintiff's damages recovery when assessing the reasonableness of the fees incurred in connection with plaintiff's claim that Allied terminated her employment in violation of the ADA. *Farrar*, 506 U.S. at 114. The concurring opinion in *Farrar* indicates, however, that additional factors, such as "the significance of the legal issues" on which plaintiff prevailed and the "public purpose' served by plaintiff's litigation, also should inform the Court's assessment. 506 U.S. at 117.

The principles announced in *Farrar*, decided under 42 U.S.C. §1988, clearly apply to §12205, which governs reimbursement of fees incurred on plaintiff's ADA claim. *See* note 2 *supra*. But do *Farrar*'s statements about the proportionality between damages and fees apply to plaintiff's successful claim that Allied considered gender in its decisions not to promote her? Because the jury found that Allied proved that it would not have promoted plaintiff even if it had not taken her gender into account, plaintiff was not entitled to monetary damages on her successful claim that Allied considered gender in its decisions not to promote her. 42 U.S.C. §2000e-5(g)(2)(B)(ii). Section 2000e-5(g)(2)(B), which governs the award of fees for a successful mixed motive claim, grants the Court discretion to award attorney's fees *specifically* where there is no monetary recovery. Congress was aware that courts consider the degree of a plaintiff's success in determining a reasonable attorney's fee when it enacted 42 U.S.C. §2000e-5(g)(2)(B) in 1991. *Farrar* was not decided under section 2000e-5(g)(2)(B). The Court is constrained to follow the law. Under these circumstances, the Court finds that *Farrar's* statements about the proportionality between damages and fees do not apply when

the fee award would be predicated on the mixed motive statute.[5] Nonetheless, the Court acknowledges that under *Hensley* it must evaluate the degree of plaintiff's success on her claim that Allied considered gender in its decisions not to promote her.

The Court must determine how to exercise the discretion conferred on it by Congress. In assessing the degree of plaintiff's success on her claim that gender was a motivating factor in Allied's decisions not to promote her, we should consider the extent to which plaintiff's case vindicates important rights and promotes Congress' goal of preventing discrimination in the workplace. The Court may consider, *inter alia*, the following interconnected factors: (1) the significance of the legal issues on which plaintiff prevailed; (2) the magnitude of the public benefit conferred by plaintiff's lawsuit; (3) whether the case will act as a deterrent to the defendant and/or to others similarly situated; (4) the "reasons why injunctive relief was or was not granted";[6]

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5. *Accord, Hannon v. Chater*, 900 F. Supp. 1276 (N.D. Cal. 1995) (in mixed motive case language of *Farrar* is preempted by language of §2000e-5(g)(2)(B)); *Hall v. City of Brawley*, 887 F. Supp. 1333 (S.D. Cal. 1995) (same). The Court has located very few cases that address the applicability of *Farrar*'s emphasis on plaintiff's monetary recovery to mixed motive claims, and none of them is controlling in this circuit. We recognize that the Fourth Circuit has held that *Farrar*'s statements about the proportionality between damages and fees do apply to fee awards under §2000e-5(g)(2)(B). *Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332 (4th Cir. 1996). We respectfully disagree with the Fourth Circuit on this issue.

6. *Sheppard*, 88 F.3d at 1336.

(5) the range and type of any declaratory relief; (6) whether Allied demonstrated extreme animus based on plaintiff's gender or whether the case was predominated by legitimate consideration of plaintiff's merit (*i.e.*, the strength of plaintiff's evidence); (7) whether the mixed motive verdict served another legitimate purpose of the lawsuit; and (8) whether the lawsuit vindicated plaintiff by substantiating her belief that she was the victim of discrimination, by proving to management that she was discriminated against, and/or by removing a negative taint from her employment history.[7]

D. *Determining a Reasonable Hourly Rate*

Plaintiff is entitled to reimbursement of her attorney's fees at the hourly rate prevailing in the San Francisco Bay Area for similar services performed by an attorney of reasonably comparable skill, experience, and reputation. *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989); *Schwarz*, 73 F.3d at 908; *Davis v. Mason County*, 927 F.2d 1473 (9th Cir. 1991); *Bucci v. Chromalloy Am. Corp., Liberty Radia... Div.*, 1989 WL 222441 (N.D. Cal.). This standard also applies to the rates charged for work performed by paralegals and law clerks. *Missouri*, 491 U.S. 20 at 286-87. Plaintiff bears the burden of proof on these issues. *Jordan v. Multnomah County*, 815 F.2d 1258, 1263 (9th Cir. 1987). To meet that burden, plaintiff could adduce evidence consisting of an affidavit by plaintiff's counsel, declarations by other Bay Area attorneys, published surveys of the rates charged by Bay Area lawyers, and published opinions pertaining to

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7. *E.g., City of Riverside v. Rivera*, 477 U.S. 561, 585-586 (1986) ((1) and (2)); *Sheppard*, 88 F.3d at 1336 ((4), (5) and (6)); *Gudenkauf*, 953 F. Supp. at 1239 n.1 ((3),(6),(7), and (8)).

federal litigation of similar complexity.[8] *Schwarz*, 73 F.3d at 908; *Chalmers v. City of Los Angeles*, 796 F.2d 1205 (9th Cir. 1985) *amended as to different issue by* 808 F.2d 1373 (9th Cir. 1987).[9]

The Court may award a single rate for all tasks reasonably performed by counsel. *Davis*, 976 F.2d at 1548. However, where counsel is a solo practitioner and, thus, responsible for both "partner" and "junior associate" type tasks, the award of a premium (*i.e.*, partner level) rate for all tasks could be excessive. *Finkelstein v. Bergna*, 804 F. Supp.

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8. The Court's comparison to rates charged in other similarly complex litigation is not limited to civil rights cases. *Finkelstein*, 804 F. Supp. at 1243.

9. At one time, courts adjusted the fee award based on the following factors: "(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases." *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975). It is now accepted that most, if not all, of the *Kerr* factors are subsumed by the Court's initial calculation of the reasonable number of hours expended at a reasonable hourly rate. *Chalmers*, 796 F.2d at 1212. The first factor reflects the reasonable hours expended, while the remaining factors inform the Court's determination of the reasonable hourly rate. *Ortega v. O'Conner*, 1996 WL 724779, *2 (N.D. Cal.). The Court need only consider those factors that are relevant.

1235, 1246 (N.D. Cal. 1992). The Court may award a blended rate, one that is less than the premium rate to which counsel would be entitled but more than the prevailing rate for a junior associate, in order to adjust for the solo practitioner's performance of tasks that require a relatively lower level of legal skill. *Finkelstein*, 804 F. Supp. at 1246.

E. *Adequacy of Plaintiff's Supporting Documentation*

"The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Hensley*, 461 U.S. at 437. Plaintiff's counsel must maintain billing records in a manner that will apprise the Court of the nature of the activity performed *and which claims the activity was intended to further*. *Hensley*, 461 U.S. at 437. "It is not sufficient for prevailing counsel to opine that all of the time claimed was usefully spent and the district court should not uncritically accept counsel's representations concerning the time expended." *Jordan*, 815 F.2d at 1263 n.8; *Gates*, 987 F.2d at 1400. The Court may reduce the plaintiff's fee award where the documentation of hours is inadequate. *Hensley*, 461 U.S. at 433; *Richard v. City of Pasadena*, 889 F. Supp. 384, 393 (C.D. Cal. 1995).

III. PLAINTIFF'S SUPPORTING DOCUMENTATION IS INADEQUATE

The Court finds that Mr. Bacon's billing records are inadequate; in fact, his records make it virtually impossible to determine how much time he actually spent on (1) each of plaintiff's various claims; or (2) the individual tasks or undertakings listed in his billing statements.

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Lawyers in Mr. Bacon's position have been on notice since 1983 about the proper manner in which to maintain their billing records. *Hensley*, 461 U.S. 424. Mr. Bacon should have realized the importance of properly maintaining his records in a case like this, where it should have been obvious from the outset that there was a substantial risk that plaintiff would not prevail on *all* of her claims and that the odds that she would be successful varied dramatically from claim to claim (*e.g.*, the evidence proffered on her age and religion discrimination claims was thin throughout the lawsuit). In light of the approximately 14 years that Mr. Bacon has been aware of *Hensley*'s directive to maintain adequate billing records and the obviousness of the risk that plaintiff would not prevail on every claim, it would be highly inappropriate to resolve doubts caused by the billing records against Allied.

Mr. Bacon's billing statements suffer from several serious defects. First, other than Mr. Bacon's conclusory assertion, there is no evidence that Mr. Bacon made a good faith effort to eliminate excessive, duplicative, and unnecessary hours. *See* Declaration of Daniel Ray Bacon in Support of Plaintiff's Petition for Attorney's Fees, filed December 20, 1996, ¶8. Second, Mr. Bacon's time records contain "commingled and undifferentiated estimates of time that was spent productively . . . [and] . . . unproductively." *Schwarz*, 73 F.3d at 906. Mr. Bacon has provided only cryptic overly-general work descriptions that fail to identify the claims to which the tasks pertained. Here, as in *Schwarz*, the Court was "[e]ssentially left to its own devices" in fashioning a reasonable fee award based on plaintiff's limited success because Ms. Norris, like Ms. Schwarz, "always

maintained that she was entitled to all hours expended by her attorneys [and therefore,] made no effort to identify for the district court which of the hundreds of hours were spent on the unsuccessful claims." *Schwarz*, 73 F.3d at 904, n.3.

Third, even if Mr. Bacon had properly identified the subject matter of his time entries, he did not maintain his records in a manner that permits the Court to determine whether the number of hours expended on recoverable tasks was reasonable or excessive. Although Mr. Bacon identifies the general nature of an entry (*e.g.*, "document request," "deposition," "letter to opposing counsel") he rarely, if ever, identifies the size, substance, or complexity of these entries, rendering it impossible for the Court to determine what amount of time a reasonably competent lawyer would devote to them. As significant, Mr. Bacon has repeatedly failed to allocate the total time for a day among the multiple tasks performed on that day. Attorneys "must keep meticulous, contemporaneous time records" which "reveal . . . how those hours were allotted to specific tasks — for example, how many hours were spent researching, how many interviewing the client, how many drafting the complaint, and so on." *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983). Mr. Bacon failed to meet this obvious record-keeping obligation. In addition, for the relatively few entries where the Court could determine the hours expended on a specific task, Mr. Bacon *often* claimed much more time for specific tasks than any competent lawyer would have spent.[10]

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10. Examples of such patent over-billing include the following: (1) In March 1995, counsel billed 1.5 hours for drafting a *three sentence* letter in response to a one page notice regarding the appointment of an ENE evaluator. (2) In May 1995, counsel billed

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over 3.5 hours to review and edit a one page letter to Judge Lynch that was first outlined by his paralegal. (3) In June 1995, counsel billed 2 hours to review a *1 sentence* notice from the Court regarding a rescheduled case management conference and almost 1 hour to review a *2 sentence* notice from the Court regarding witness lists and another rescheduling notice. (4) In August 1995, counsel billed 3 hours for a status conference located in San Francisco, not far from his office. (5) In January 1996, counsel billed 3 hours for reviewing a notice appointing an ENE evaluator and a telephone call with Ms. Norris regarding the same. (6) In April 1996, counsel billed at least four hours for a status conference statement not found in the master file. (7) Counsel billed 8 hours for *each* of the *six* days the jury deliberated, including the day the verdict was returned and the Court adjourned at 3:45 p.m. It is unreasonable to bill for the time spent waiting for the jury to return. It is incumbent on the attorney to bring along other work to occupy the time spent waiting. (8) Counsel billed approximately 5.5 hours for review and research of defendant Sysco's motion to dismiss based on insufficient service. Counsel's description, however, fails to indicate what issue he was researching. Based on the substance of Sysco's motion on file in this action, the Court presumes that counsel researched whether an employee of a subsidiary can accept service on behalf of the parent company. The Court finds that 5.5 hours is an excessive amount of time in which to analyze and research such a straight-forward issue. (9) Counsel billed for research on "post-trial motions" and "jury verdict" conducted while the jury was still deliberating. A reasonably efficient attorney would not conduct research based on a verdict until she or he knew what the verdict was. (10) Counsel billed 14.5 paralegal hours for taking notes in depositions conducted by counsel. The Court finds that it is unreasonable to bill defendant for a notetaker in depositions in this case. (11) Counsel billed 6.5 hours to review a Glass Ceiling Commission Report. Such efforts are akin to continuing education for a civil rights attorney. Counsel may not pass the entirety of those costs onto Allied. (12) Plaintiff unreasonably sought to shift the costs she incurred in retaining her attorney to defend her at a deposition in a separate case.

Fourth, a substantial number of Mr. Bacon's entries begin with "Review file;" and then are followed by a list of tasks completed on that day. The punctuation (semi-colon) suggests that "review file" is a discrete task performed on that day — separate from the other tasks described in the entry.[11] If so, Mr. Bacon should have submitted evidence to support the implication that the size and complexity of the file required almost daily review. Given the ubiquitousness of the "review file" entry, the Court cannot help but wonder whether "review file" was simply a phrase that Mr. Bacon used to indicate that he did some work on Ms. Norris' case. If so, he should have punctuated with a colon and/or informed the Court that no time in the total for any day was to be allocated to "review file.".

Fifth, Mr. Bacon almost invariably billed in one-half hour increments — without submitting any evidence that such a practice was accepted in the relevant market. The Court finds this practice patently unreasonable. While it is unclear to what extent counsel overbilled in this fashion on tasks such as research and motion drafting, it is highly likely that most of the telephone calls were overbilled in this manner.

Sixth, plaintiff's original submission ("Revised Billing Statement") did not consist of contemporaneous records.

For these reasons, on January 29, 1997, at a hearing on plaintiff's Petition, the Court ordered plaintiff and her counsel to submit additional documentation that would

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11. This suggestion is also supported by the fact that, in several entries, "review file" appeared in the middle of the list of tasks.

enable the Court to determine which hours were reasonably expended on plaintiff's successful claims. *See* WDB Tape No. C97-11. Plaintiff's supplemental documentation was totally unresponsive to the Court's order. In fact, plaintiff repeatedly insisted that all of counsel's time was spent "100% . . . on Mrs. Norris' entire complaint as a whole . . ." *See* Declaration of Daniel Ray Bacon in Support of Plaintiff's Petition for Attorney's Fees and Expenses, dated February 18, 1997 ("Supplemental Bacon Decl.") at ¶5, and ¶¶7, 10, 22, 26, 31, 33, 35, 39, 40, 41, 47, 50, 51, 52, 56, 62, 63, 64, and 67.

In response to the order that he submit his contemporaneous records, counsel submitted an incomplete computer printout (the so-called "Contemporaneous Billing Statement") that did not differ substantially from the so-called "Revised Billing Statement" that he submitted initially.[12] The Contemporaneous Billing Statement, like the Revised Billing Statement, provides no indication, within the vast majority of time entries, as to how the time was allocated among specific tasks billed in each entry. In fact, the Revised Billing Statement, presumably composed months or even years after the fact, sets forth some time allocations

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12. The Contemporaneous Billing Statement was incomplete because of an alleged computer glitch that would not allow Mr. Bacon to print out the "contemporaneous" statement after September 16, 1996. The Court ordered Mr. Bacon to retain an appropriate computer expert to repair the computer problem and, if irreparable, to submit a declaration by the expert describing the reason that she or he failed to recover the data. Mr. Bacon submitted the declaration of Steven Liu who merely states that he is "an expert in computers" without setting forth supporting evidence of his qualifications.

that *did not appear* in the purportedly contemporaneous billing statement. The Revised Billing Statement also contains entries not found in the contemporaneous records.[13]

The Court directed Mr. Bacon to submit documents, such as his witness interview outlines, that would help the Court conduct an independent analysis of the appropriate percentage allocation of work attributable to plaintiff's successful claims. WDB Tape No. C97-11. *See, e.g., Davis v. San Francisco*, 976 F.2d 1536 (plaintiff supplemented fee petition with meeting agendas, summaries, and notes). Plaintiff, ignoring the Court's order, submitted no interview outlines, discovery requests, or any other documentation that would allow the Court to determine the recoverable portion of fees related to Mr. Bacon's representation.

The Court informed Mr. Bacon that his practice of billing in one-half hour increments appeared patently unreasonable. Nonetheless, Mr. Bacon submitted neither alternative, reasonable billing statements nor any support for his assertion that such a practice is common in the industry. In sum, plaintiff's supplemental submission contributed virtually nothing to the Court's ability to conduct the analysis that is necessary to fix a legally appropriate fee award.

IV. DETERMINATION OF NORRIS' FEE AWARD

The Court painstakingly tried to compute plaintiff's reasonable attorney's fee in a rational manner.

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13. These claims, as presented by plaintiff, total approximately $8,830.

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Approximately ten days of person-power were expended in a studied effort to analyze, parse, categorize, evaluate and allocate the pleadings and papers on file in this action, as well as the entries in plaintiff's billing statements, in order to determine the number of hours counsel expended on various tasks and which of those were compensable. Our effort failed, however, because Mr. Bacon (1) rarely allocated the hours expended on each day among the various tasks performed on that day, and (2) failed to identify the claims to which the tasks pertained. Given these defects in plaintiff's documentation, the Court concluded that even the most rational method of analysis it could muster is unacceptably unreliable.

Thus, the Court has been forced, by plaintiff, to resort to a reasoned "across-the-board" percentage allocation method.[14] We must reduce plaintiff's fee request to account for (1) the extent to which counsel's billing statements reflect overbilling due to overreaching and patently excessive billed hours; (2) work performed in connection with unrelated and unsuccessful claims; and (3) the degree of plaintiff's success. As described more fully below, we reduce the hours billed by counsel by 25% to account for overbilling (section IV(A));

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14. When faced with a sizeable fee application, courts may employ an "across-the-board percentage" reduction. *Gates*, 987 F.2d at 1399. Although this "meat-axe approach" has been criticized where substantial fees are claimed *and* the court fails to explain its basis for choosing that particular percentage, such percentage cuts are "acceptable, and perhaps necessary, tools for district courts fashioning reasonable fee awards." *Gates*, 987 F.2d at 1400. *See also Schwarz*, 73 F.3d at 904-905 (discussing "crude" or "cold" mathematical approach reductions upheld by the Ninth Circuit).

by 20% to account for hours unreasonably expended in connection with unsuccessful, unrelated claims (section IV(B)); and by 11.25% to account for the limited degree of plaintiff's success (section IV(C)).

A. *Reduction for Overbilling*

The hours submitted by plaintiff are inflated due to overbilling for, at least, the following reasons: (1) we found at least twelve examples of patent overbilling (*see*, footnote 9); (2) Mr. Bacon regularly billed in one-half hour increments — without justification; (3) based on the Court's experience, observations of the lawyering in this action, and intimate knowledge of this case, it is quite clear that a reasonably competent and efficient attorney would have spent much less time than Mr. Bacon has litigating this action; and (4) plaintiff submitted for reimbursement five tasks that are *clearly* not compensable because they are not sufficiently related to successful claims.[15]

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15. The Court reviewed the Contemporaneous and Revised Billing Statements (collectively "Billing Statements") and identified tasks that were clearly unrelated to plaintiff's successful claims and, therefore, not compensable. *See* section IV(B), *infra*, for discussion about which of plaintiff's unsuccessful claims are sufficiently "related" to her successful claims. Because Mr. Bacon so rarely identified the claims to which his work pertained, we were able to identify very few such tasks. However, the following tasks are "unrelated" to plaintiff's successful claims and, thus, not compensable in their entirety: (1) outlining defendant's conduct regarding "race and disabilities" and research on federal contractors and disabilities performed on December 7 and 22, 1993; (2) research on conspiracy performed on February 16, 1994; (3) review of the

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The pleadings and papers on file in this action (unlike Mr. Bacon's Billing Statements) provide the Court with a sense of the time and complexity involved in the matters reflected therein. Therefore, in order to get leverage on the extent to which Mr. Bacon overbilled in this action, we compared the number of hours billed by Mr. Bacon in connection with the matters in or inferable from the pleadings and papers on file in this action (the "Docketed Matters")[16] to our determination of the number of hours that an attorney of reasonable competence and efficiency would have taken to complete those same matters (*i.e.*, the amount of time Mr.

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Family Leave Act and conference with client about the same performed on March 29, 1995; (4) research on fraud performed on June 3, 1996; and (5) review of defendant's balance sheets in connection with punitive damages claim performed on August 29, 1996. In addition, plaintiff improperly sought reimbursement for hours that appeared on the Revised Billing Statement but not on the Contemporaneous Billing Statement (up through September 16, 1996 when the contemporaneous records stop).

16. "In or inferable from" means those tasks that in the normal course of events would have been performed in conjunction with the matters reflected in the docket. For example, where the docket includes a motion to compel discovery responses, the matters reflected "in" the docket would include the time to draft and edit the motion, to review the opposition, and to draft and edit the reply. In contrast, the time "inferable from" that same motion would be the time to research the law contained in the motion, to research the law presented in the opposition papers, and to participate in the hearing on the motion. In some cases the Court was able to estimate the time spent attending the hearing on a motion by reviewing other matters in the docket, *e.g.*, the hearing minutes or the substance and length of the Court's ruling on the motion.

Bacon should have expended).[17] As described with more particularity below, the insights this comparison generated were suggestive but of only limited utility because we repeatedly were required to guess, within broad boundaries, about the number of hours that counsel actually billed in connection with these Docketed Matters. Nonetheless, *most often*, the Court's best guess of the number of hours actually expended by Mr. Bacon *exceeded* the Court's estimate of the number of hours an attorney of reasonable competence and efficiency would have expended on the same project.

1. *Description of Comparison*

First we reviewed each document on file in this action and estimated the number of hours an attorney of reasonable competence and efficiency would have taken to complete the matters therein or inferable therefrom.[18] Next, we looked

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17. At this initial juncture the Court's estimate reflects the number of hours reasonably expended on the *entire* Docketed Matter without regard to the percentage of the matter that pertained to successful claims and without adjustment for plaintiff's degree of success. The Court's estimates reflect a billing practice that bills in .10 increments. It is the Court's experience that billing in 1/10 of an hour increments is a common practice among attorneys in the Bay Area.

18. Where a Docketed Matter involved work by both Mr. Bacon and his paralegal, we determined the number of hours expended by an attorney of reasonable competence and efficiency and a paralegal of reasonable competence and efficiency. In so doing, we considered, among other things, the division of labor reflected by the Billing Statements and, where none was reflected, the probable division of labor given the relevant task.

to Mr. Bacon's Billing Statements to determine what tasks he actually performed in conjunction with the matter(s) reflected in each particular document as well as the approximate amount of time that Mr. Bacon spent on those tasks.[19] The Court immediately faced an essentially insurmountable obstacle. Because counsel's daily entries rarely contain allocations that would allow the Court to determine with any level of precision the actual number of hours expended on each of the tasks therein, the Court was able to establish only expansive outside boundaries for the actual number of hours spent performing any given task. Within this range, the Court estimated the actual number of hours expended on a task based on (1) the number and nature of the other tasks performed on the relevant days; (2) the total number of hours billed on that day; (3) the number of days that counsel worked on the particular task; (4) whether counsel or his paralegal performed the work; (5) the length and complexity of the relevant pleading or paper on file; (6) the Court's own experience in these matters; and (7) defendant's objections, if any, to the time apparently spent on the task. Essentially, the Court was forced to guess repeatedly about the actual number of hours spent on each task.

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19. The Court relied primarily on the Contemporaneous Billing Statement. Although the Revised Billing Statement contained allocations among tasks, many of these were not found in the contemporaneous records. The absence of these allocations in the contemporaneous records renders them suspect.

Appendix B

2. *Apparent Percentage of Overbilling*

We determined that an attorney of reasonable competence and efficiency would have expended 464.60 hours and a paralegal of reasonable competence and efficiency would have expended 221.20 hours in connection with the matters in or inferable from the docketed pleadings and papers. By our rough estimate, the amount of time for which plaintiff appears to be seeking compensation in connection with these same matters includes 793.8 hours for Mr. Bacon and 399 hours for his paralegal. Thus, under this admittedly crude comparison, it appears that roughly 41% of the hours billed by Mr. Bacon and 44% of the hours billed by his paralegal may be attributable to overbilling.

Although our comparison suggests that a 40% reduction of counsel's hours is appropriate, we recognize that this comparison is unreliable — because, within broad boundaries, we were required so often to guess about the number of hours plaintiff was claiming on given days for work on listed tasks. Based on the Court's extensive familiarity with this case, we are relatively certain that the crude method we used to make these comparisons resulted in an overestimation of the extent of counsel's overbilling. Thus, we conclude that it is appropriate to reduce the number of hours submitted by plaintiff by 25% to account for counsel's overbilling.

Appendix B

B. *Reduction for Work Performed on Unsuccessful, Unrelated Claims*

Our goal in this section is to determine the percentage by which the overall hours billed should be reduced as a result of plaintiff's lack of success on a large number of her claims. Plaintiff is entitled to reimbursement only for work on successful claims and on unsuccessful claims that are sufficiently related to her successful claims. *See* section II(A), above.

In section IV(B)(1), below, we determine which unsuccessful claims were "related" to plaintiff's successful claim that Allied terminated her in violation of the ADA and which claims were "directly attributable only to" her successful claim that Allied considered gender in its decisions not to promote her. *See* section II(A) above (discussing two separate "relatedness" standards).

After determining which claims are compensable (*i.e.*, successful or unsuccessful but related) and which are not compensable (*i.e.*, unsuccessful *and* unrelated), we attempt to determine the percentage of the work performed by plaintiff's counsel that pertained to the compensable claims.

We attempt to gain some leverage on this issue in several ways. First, we parse the pleadings (the Original and Amended Complaints) to determine the percentage of the case *as pled* that pertained to compensable claims and the percentage that pertained to unsuccessful, unrelated claims. As described more fully below, we parse the pleadings based on the number of fundamental wrongs alleged, as opposed

to the number of claims (*i.e.*, legal theories) asserted. Although the resulting percentage is potentially instructive, it is not dispositive where, as here, a substantial gap existed between the pleadings and the true focus of counsel's efforts. Second, we reviewed the pleadings and papers on file in this action and determined the percentage of each that pertained to compensable claims. Finally, and most important, we drew extensively on our considerable first hand knowledge of what was actually litigated — and where most of the litigation energy was focused.

1. *Unsuccessful Claims "Related to" or "Directly Attributable Only to" Plaintiff's Successful Claims*

The Court finds that work performed in connection with plaintiff's unsuccessful claim that, prior to her termination, Allied refused to "reasonably accommodate" her and, thus, to reinstate her, was related to and furthered her successful claim that Allied terminated her employment in violation of the ADA. Plaintiff's pretermination and termination ADA claims were premised on the same set of circumstances, required much the same evidence, and involved the same perpetrators. When plaintiff began disability leave in September 1994, she began a continuum of interaction among herself, her physicians, and Allied that lasted until her termination, some 16 months later. This course of conduct consisted, primarily, of correspondence among the three participants regarding when plaintiff would be available to resume working. In order to prove that Allied terminated her in violation of the ADA, plaintiff had to demonstrate that Allied refused to reasonably accommodate her disability.

To support this proposition it was not unreasonable for plaintiff to present evidence about the interaction that preceded her termination.

On the other hand, the Court finds that the work counsel performed on plaintiff's claims for discrimination and harassment on the basis of gender, age and religion and for retaliation (and all the legally duplicative claims asserted therewith) was not related to her successful ADA claim. These claims are premised on entirely different facts and legal theories. Plaintiff's discrimination, harassment, and retaliation claims arose from an entirely distinct and separate course of conduct and required the presentation of entirely different evidence. Although plaintiff alleged in her Amended Complaint that Allied refused to reinstate her and terminated her based on her gender and age, as well as in retaliation for her complaints to management and for her cooperation with the federal investigators, none of the evidence in support of these allegations can logically be said to support her successful ADA claim. In order to establish a violation under the ADA plaintiff had to prove that (1) Ms. Norris was a "qualified individual"; (2) Ms. Norris would have been able to perform the essential functions of her position with reasonable accommodation; (3) Ms. Norris requested reasonable accommodation or Allied should have known that she wanted to resume working with reasonable accommodation; (4) Allied could have accommodated her without undue hardship; (5) Allied did not offer her reasonable accommodation; and (6) Ms. Norris' disability was a motivating factor in Allied's decision to terminate her. None of these elements necessitates evidence of discrimination, harassment, or retaliation based on gender,

age, or religion. Because plaintiff could establish a violation of the ADA only by proving the six elements listed above, any showing of discrimination, harassment, or retaliation premised on gender, age, or religion were superfluous to plaintiff's ADA claim. Plaintiff's fraud and negligent misrepresentation claims were similarly unnecessary and unhelpful in proving a violation of the ADA.

Plaintiff also could have access to fees for work on any unsuccessful claims that she could show was "directly attributable only to" her successful claim that Allied considered gender in decisions not to promote her. The Court finds that plaintiff's claims for breach of contract, breach of the covenant of good faith and fair dealing, negligent and intentional infliction of emotional distress, and violation of the California Constitution and California public policy — as they relate to gender discrimination — were "directly attributable only" to her cause of action for gender discrimination in promotions. These claims were substantially legally duplicative of plaintiff's successful gender discrimination cause of action and required little factual development independent of her claim that Allied decided not to promote her because she is a woman. Plaintiff presented essentially, if not entirely, the same evidence in support of each of these claims, and the cognizable injury at the core of each claim was Allied's alleged impermissible consideration of gender in its promotion decisions. Because these claims were predominantly reiterations of plaintiff's successful gender discrimination claim, and were not viable absent that successful claim, the Court cannot reasonably disentangle work performed in connection with these unsuccessful claims from that performed in furtherance of

her successful claim that gender was a motivating factor in Allied's failure to promote her.

Further, the Court finds that while plaintiff's claims for violation of the EPA, for sexual harassment, and for gender discrimination in termination[20] were based on legally distinct wrongs, a great deal of the work devoted to developing these claims also yielded benefits for plaintiff's successful claim that Allied considered gender in its decisions not to promote her. Although plaintiff failed to prove that Allied refused to reinstate her and/or terminated her because of her gender, in her attempt to support that contention (and its legally duplicative causes of action) plaintiff relied for the most part on evidence about the same conduct that supported her claim that Allied had considered gender in other management decisions, such as promotions. Thus, these claims involved largely the same circumstances, the same evidence, and the same perpetrators. Plaintiff was required to do little additional investigation and discovery regarding Allied's unlawful consideration of gender in its employment decisions during the second phase of the lawsuit — when the termination claim arose. Also, hours expended on plaintiff's sexual harassment and EPA claims were directly attributable to her successful gender discrimination claim, in that a reasonable attorney, deciding prospectively, likely would have pursued evidence about Allied's alleged hostile environment (based on sexual harassment) and unequal

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20. The Court also includes plaintiff's claims for breach of contract, breach of the covenant of good faith and fair dealing, negligent and intentional infliction of emotional distress, and violation of the California Constitution and California public policy — as they relate to gender discrimination and/or sexual harassment.

wages in support of plaintiff's claim that an unlawful gender animus permeated Allied's management.

In sharp contrast, the Court finds that no portion of plaintiff's work on claims for discrimination, harassment, or retaliation based on age or religion, and no portion of her work on the claims for fraud, negligent misrepresentation, or violation of the ADA, were "directly attributable only to" her successful claim that Allied considered gender in its decisions not to promote her.[21] These claims consisted of legally and factually distinct theories, in which the core cognizable injuries did not consist of gender discrimination, but rather of mistreatment, deception, and/or discrimination based on age, religion, or plaintiff's status as disabled. As the Court previously noted, the elements of these alleged injuries required plaintiff to conduct substantial additional discovery and to present substantially different evidence than that presented in support of her gender discrimination claim. For example, plaintiff cannot seriously argue that evidence that Allied personnel made harassing comments about her religious beliefs supported the allegation that she was denied promotions because she is a woman.

As pointed out above, plaintiff also asserted each of her claims against Sysco. But because Sysco prevailed on

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21. Plaintiff's breach of contract, California constitution, and public policy claims were based on gender and age discrimination, sexual and religion-based harassment, and/or retaliation. We found that only the portions of those claims relating to gender discrimination and sexual harassment were directly attributable to plaintiff's claim that gender was a motivating factor in Allied's failure to promote her.

summary judgment, none of the claims against Sysco was successful. In reality, the vast majority of these claims were verbatim repetitions of the claims against Allied and were based primarily on evidence of Allied's actions. Accordingly, most of the unsuccessful claims against Sysco required little work beyond that performed in connection with Allied. Nonetheless, certain claims did require plaintiff to proffer evidence unique to Sysco and counsel attempted, unsuccessfully, to unearth evidence that would allow plaintiff to hold Sysco liable for Allied's actions. Hours committed to that work are not compensable.

In sum, we hold that (1) only plaintiff's unsuccessful claim that, prior to termination, Allied refused to "reasonably accommodate" her and, thus, to reinstate her, was sufficiently related to her successful claim that Allied terminated her employment in violation of the ADA, and that (2) the following unsuccessful claims were directly attributable only to plaintiff's claim that Allied considered gender in its decisions not to promote her: (a) breach of contract and breach of the covenant of good faith and fair dealing; (b) negligent and intentional infliction of emotional distress; (c) violation of the California Constitution and California public policy — as they relate to gender discrimination; (d) violation of the EPA; (e) sexual harassment; and (f) gender discrimination in termination (and its legally duplicative claims).

Based on these conclusions, we reviewed the substantive allegations of the Original and Amended Complaints to determine what percentage of the case *as pled* pertained to plaintiff's successful claims. We describe the process of that review in section IV(B)(2) below.

Appendix B

2. *Percentage Allocation of the Case as Pled Reflecting Work Related to Successful Claims And Modification Based on the Court's Judgment*

Although we recognize that the number and character of plaintiff's claims ebbed and flowed over the course of the litigation, and that Allied's parent was eventually dismissed, we divided the case into roughly three periods: (1) the period during which the Original Complaint was operative; (2) the period between the filing of the Amended Complaint and the final pretrial conference; and (3) the period from that conference through trial.

We concluded that about 50% of the case as pled in the Original Complaint was devoted to claims that are not directly attributable to plaintiff's claim that gender was a motivating factor in Allied's decisions not to promote her. We reviewed the substantive allegations of the Original Complaint to determine the number of *distinct fundamental wrongs* that plaintiff alleged (as opposed to the number of legal theories that plaintiff asserted to redress those alleged wrongs). In the Original Complaint plaintiff alleged six distinct wrongs: mistreatment based on gender in promotion decisions, wage disparity, sexual harassment, fraud, retaliation, and mistreatment based on age.[22] Based on the conclusions set forth in section IV(B)(1) above, three of these

22. As described previously, certain of plaintiff's asserted legal theories, such as breach of contract and violation of the California Constitution, were essentially legally duplicative of, closely related to, or dependent on one or more of the fundamental wrongs. These legally duplicative theories did not allege new and distinct wrongs.

six separate wrongs (or 50%) were directly attributable to plaintiff's successful claim that Allied considered gender in decisions not to promote her (mistreatment based on gender in promotion decisions, wage disparity, and sexual harassment).

However, appellate courts have made it clear that mathematical dissection of the pleadings is not dispositive and can be misleading, and, therefore, courts must draw on their own exposure to the case as a whole to refine such simplistic percentage allocations. Accordingly, the Court, in its discretion, raised the assigned compensable percentage allocation for the period governed by the Original Complaint to 80%. The claim that Allied considered gender in its decisions not to promote plaintiff constituted the core of the case during this period and appeared to the Court to account for approximately 80% of the work performed.

In addition, we reviewed each document on file in this action and determined the percentage allocation of the matters therein or inferable therefrom that was related to plaintiff's claim that Allied terminated her in violation of the ADA or that was directly attributable only to plaintiff's claim that gender was a motivating factor in Allied's decision not to promote her. The percentage allocation assigned to filed documents other than the Original Complaint most frequently hovered around 70-80%.

Similarly, we reviewed the substantive allegations of the Amended Complaint to determine the number of distinct fundamental wrongs that plaintiff alleged. We found that 40% of the case as pled in the Amended Complaint was

devoted to unsuccessful claims that were neither (1) related to plaintiff's claim that Allied terminated her in violation of the ADA nor (2) directly attributable to her claim that Allied considered gender in its decisions not to promote her. In the Amended Complaint plaintiff alleged ten distinct wrongs: mistreatment based on gender in promotion decisions, mistreatment based on gender in the decision to terminate plaintiff's employment, wage disparity, sexual harassment, violation of the ADA based on termination of employment, violation of the ADA based on the failure to reinstate prior to termination, fraud, retaliation, mistreatment based on age, and mistreatment based on religion. Based on the conclusions set forth in section IV(B)(1) above, six of these ten separate wrongs (or 60%) were either (1) related to plaintiff's successful claim that Allied violated the ADA by terminating her employment or were (2) directly attributable to plaintiff's successful claim that Allied considered gender in decisions not to promote her (mistreatment based on gender in promotion decisions, mistreatment based on gender in the decision to terminate plaintiff's employment, wage disparity, sexual harassment, violation of the ADA based on termination of employment, and violation of the ADA based on the failure to reinstate prior to termination).

However, we again exercised our discretion by raising the assigned compensable percentage allocation for the period governed by the Amended Complaint to 80%. First, as previously stated, the percentage allocation assigned to filed documents other than the Amended Complaint most frequently hovered around 70-80%. Second, the claim that Allied violated the ADA when it terminated plaintiff and the claim that gender was a motivating factor in Allied's

decisions not to promote plaintiff constituted the core of the case at this stage and appeared to the Court to account for approximately 80% of the work performed. Third, the Court notes that almost immediately following the filing of the Amended Complaint, the Court or plaintiff dismissed the following claims: (1) the EPA portion of the *age* discrimination claims; (2) negligent misrepresentation; (3) negligent infliction of emotional distress; and (4) age discrimination in connection with an alleged wrongful transfer and failure to reinstate. In addition, the Court or plaintiff merged (1) plaintiff's claim for fraud allegedly committed prior to her termination with her claim for fraud in connection with her termination; and (2) her contract claims with her claims for breach of the implied covenant of good faith and fair dealing. Moreover, by July 1996, the Court dismissed Sysco from the case, and by August 1996, plaintiff dismissed the remaining ("non-age") portion of her EPA claim.

Turning now to the final period in this litigation, it is the Court's judgment, based on its first-hand knowledge of the final pretrial conference, the trial-related motions, and the trial itself, that approximately 80% of counsel's work at this labor intensive stage related to plaintiff's claim that Allied terminated her in violation of the ADA or was directly attributable to her claim that gender was a motivating factor in Allied's failure to promote her.

Again, we recognize that a real disparity exists between the pleadings and the true focus of plaintiff's litigation activity: alleged mistreatment based on gender and violation of the ADA. Accordingly, although a review of the *pleadings*

suggests a reduction of roughly 40% for work performed on unsuccessful, unrelated claims, our direct knowledge of the litigation and our review of the papers on file persuade us that it is appropriate to reduce the hours submitted by plaintiff by only 20% to account for time spent on unsuccessful, unrelated claims.

C. *Degree of Success*

After we have identified the compensable work (work that was done on the successful claims or that was sufficiently related to the successful claims), the law requires us to determine whether adjustments should be made in the fee award based on our assessment of the *degree* of plaintiff's success. *See* section II(A) and (C). Our analysis of "degree of success" is complicated by the fact that the two claims on which plaintiff prevailed (termination in violation of the ADA and mixed motive in promotion decisions) are *un*related — and by the fact that, under the law, we must use different criteria for assessing "degree of success" with respect to the ADA claim and "degree of success" with respect to the attack on the denials of promotions (the "mixed motive" aspect of the case).

When we determine the degree of plaintiff's success on her ADA claim we are required by *Farrar* to give "primary consideration" to the magnitude of plaintiff's damages recovery. But, as explained above, *Farrar*'s emphasis on monetary damages is inapplicable to plaintiff's mixed motive verdict. Thus it is necessary to assess the degree of plaintiff's success on her ADA claim separately from the degree of her success on her mixed motive claim. We turn to the ADA

claim first — then to the more complicated task of assessing plaintiff's success on the claim that Allied denied her promotions because of her gender.

In assessing the overall relief obtained on plaintiff's successful ADA claim and the claim related to it, the Court first assesses the magnitude of plaintiff's damages recovery. *Farrar*, 506 U.S. at 114. Plaintiff prevailed on her claim that Allied terminated her in violation of the ADA, but did not prevail on her related claim that Allied refused to reinstate and reasonably accommodate her during the period before she was terminated. The jury awarded plaintiff $300,000.00 to compensate her for emotional pain, suffering, inconvenience, mental anguish, or loss of enjoyment of life caused by Allied's violation of the ADA. Plaintiff's recovery on her claim that Allied violated the ADA when it terminated her was substantial. Accordingly, there is no principled basis for characterizing her success on this claim as limited. The Court notes, however, that plaintiff's successful ADA claim did not arise until Allied terminated her in late 1995 — almost two years after plaintiff began her lawsuit.

We turn here to the more complicated task of assessing the degree of plaintiff's success on her claim that Allied did not promote her because of her gender (as well as on the claims sufficiently related thereto). In making this assessment, we will consider each of the nonmonetary factors that we described in section II(C), above. The issue that plaintiff litigated in what turned out to be her "mixed motive" claim is of considerable public importance: Congress has made it quite clear that preventing and redressing gender discrimination in employment is a matter of high public

policy priority. *See* section II(C) (first factor). But plaintiff's case was predominantly designed to redress her private damage and her partial success conferred only a limited benefit, indirectly, on the public. *See* section II(C) (second factor). As to the third factor, plaintiff's lawsuit should act as a fairly substantial source of discipline on Allied: Allied presumably incurred substantial attorney's fees of its own in defending this suit, and because plaintiff proved that her gender was a substantial factor in at least one adverse promotion decision, Allied will be required to pay some of the fees plaintiff incurred. We can expect that these adverse monetary consequences will induce Allied to take more care in the future to assure that its promotion decisions comply with the law. But there is an additional way that plaintiff's litigation could serve as a source of discipline for Allied: this trial was attended by some publicity and it produced a judgment by a jury that was, at least, unflattering to Allied. That publicity and public judgment are sources of embarrassment — and thus additional possible sources of discipline. They also could embolden other Allied employees to more assertively seek to protect their rights — and that prospect could serve as an additional deterrent to lapses in the future. It is much less clear how much plaintiff's lawsuit will affect the conduct of other employers — but since the trial generated some publicity and since Allied is a fairly major player in its industry, we would expect this litigation to have some salutary effect on the care with which other employers handle promotion decisions.

The fourth and fifth factors that the law directs us to consider in this context focus on whether and to what extent the Court granted plaintiff equitable relief. Plaintiff sought

neither declaratory nor injunctive relief, and, therefore, these factors are not relevant to this analysis. We note that plaintiff would not have received injunctive relief in connection with her gender discrimination in promotions claim — in part because the Court cannot issue an order requiring promotion after a jury's finding of mixed motive. 42 U.S.C. §2000e-5(g)(2)(B)(ii). Moreover, plaintiff had received the principal promotion she had sought well before this case went to trial — and primarily as a result of the investigation and administrative proceedings conducted by the OFCCP, not primarily as a result of the pendency of this case. *See* Conciliation Agreement. Although Ms. Norris provided assistance and information to the OFCCP, she has not proved that the filing and prosecution of her lawsuit played a major role in the decision by Allied to enter the settlement with the OFCCP that resulted in her promotion.

We turn now to the sixth factor: the strength of plaintiff's evidence that Allied's promotion decisions were in fact corrupted by unlawful consideration of her gender. We are mindful of the relative roles of court and jury in this setting, and that the jury concluded that Ms. Norris proved that her gender was a substantial factor in at least one decision by Allied not to promote her. The evidence that plaintiff marshaled to support this conclusion certainly was not insubstantial, but it also was by no means overwhelming. The most telling support for this characterization of the relative probative power of the evidence comes from the jury's deliberations: it appears that it took the jury several days to decide whether a preponderance of the evidence supported a finding that Ms. Norris' gender had been a substantial factor in a decision by Allied not to promote Ms.

Norris. The questions the jury asked the Court (during the deliberations) and the time the jury devoted to this issue suggest that it was a close question in their collective mind — and perhaps that there were substantial differences of opinion within the jury about how to resolve this fundamental question. The Court's independent view of the weight of the evidence would be consistent with this perception of the jury's view: while there clearly was some evidence to support a finding that gender played a role in the decision-making, I would not say that the evidence compelled such a conclusion or that the evidence would support a finding that Allied's decision-makers demonstrated anything approaching extreme animus toward women. In short, I do not believe that plaintiff's evidence showed that that animus that the jury found in the promotion decision was extreme or severe.

The Court reads the seventh factor, whether the mixed motive verdict served another legitimate purpose of the lawsuit, as a reiteration of the question whether plaintiff's claim that Allied considered gender in its decisions not to promote her was related to another successful claim asserted by plaintiff. It was not: the allegation that Allied had denied plaintiff promotions because of her gender was unrelated to the claim that Allied violated the ADA when it terminated her.

The eighth factor focuses on the personal and emotional benefit that the jury verdict delivered to plaintiff. The Court finds that the jury's verdict vindicates the plaintiff's belief that consideration of her gender unlawfully played a role in the denial of her promotion — and vindication of that belief presumably is important to plaintiff, even though it is not

accompanied by either compensatory or equitable relief and even though Allied persuaded the jury that additional, lawful considerations would have led it to deny plaintiff the promotion even if gender had not been a factor. It is less clear, however, that the jury verdict removes a negative taint from plaintiff's employment record. On the one hand, because Allied would not have promoted her even absent its consideration of her gender, the denial of a promotion based on merit remains on her employment record. On the other hand, any negative comments related to plaintiff's complaints about gender discrimination that might be in Allied's files are negated by the jury's verdict.

We also point out, again, that plaintiff had secured one dimension of the relief that her lawsuit was initially designed to secure by December 21, 1994, when Allied agreed, as part of its consent decree negotiations with the OFCCP, to promote her from her prior position as Nonfood Brand Specialist to Sysco Brand Manager West. *See* Conciliation Agreement. Thus, almost two years before the case went to trial, Allied had reversed some of the negative consequences of its allegedly discriminatory promotion decision. And, as noted, this benefit to plaintiff was secured directly by the OFCCP, not as a result of this lawsuit or any finding by a jury. This consideration also supports a conclusion that plaintiff's success on her discrimination claim was only limited.

Finally, we think it is pertinent here that at least some of the work that would be compensable because it was directly related to development of this claim also, simultaneously, was used to try to establish other,

unsuccessful claims, *e.g.*, that plaintiff was the victim of sexual harassment, that the way Allied compensated plaintiff violated the Equal Pay Act, or that in terminating her Allied discriminated on the basis of plaintiff's gender. Stated somewhat differently, plaintiff tried to use some of the same evidence for multiple purposes, some of which were unsuccessful and some of which were successful, at least in part.[23] *See* discussion section IV(B) above. The fact that plaintiff used some of this evidence not only to substantiate her successful claim, but also to continue to litigate unsuccessful claims is yet another consideration that points in the direction of a finding that the degree of her success was limited — and that some downward adjustment should be made in the fees that are otherwise attributable to litigating plaintiff's claim that she was the victim of gender discrimination in Allied's promotion decisions.

Taking all of the factors discussed above into balanced account, we conclude that the results plaintiff obtained on her claim that Allied discriminated against her on the basis of her gender in promotion decisions were not remarkable; her "degree of success" was modest. Given the modesty of that success, but the importance to public policy of the right she vindicated, the Court concludes that it is appropriate to reduce the fees that are attributable to this claim by 15%.

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23. The Court also notes that plaintiff essentially prevailed on her EPA claim. The EPA claim was dropped from this lawsuit only because Allied had agreed to make retroactive adjustments in Ms. Norris' compensation and job classification as a result of the OFCCP's investigation. Conciliation Agreement.

Appendix B

Because Mr. Bacon did not keep records in a manner that permits us to determine precisely which fees are attributable to this claim (and to the others that were sufficiently related to it), we must resort, again, to a reasoned approximation. The following findings inform our making of this approximation: (1) first, no reduction (based on "degree of success") is appropriate for work done on the ADA claims; (2) second, the pretrial period was more than half over before the ADA claims were introduced into the litigation, but the latter half of the litigation, which included the trial, was more labor intensive than the first half, (3) third, during the first half of the pretrial period, the gender claims consumed most of counsel's time, and (4) fourth, based on our extensive exposure to the case, we conclude that after the ADA claims were pled, plaintiff's counsel devoted roughly the same amount of time to developing the gender discrimination claims as he did to developing the ADA-related claims. These findings support a further finding that over the entire life of the case, plaintiff's counsel devoted about three times as much time to the gender-related claims as to the ADA-related claims (counsel devoted no time to the ADA in the first half of the case and split his time about 50-50 with the gender claims in the second half). In other words, the split between the gender claims and the ADA claims is roughly 75% to 25%. Since we are reducing (for "limited success") the fee award only for 15% of the work attributable to the gender claims, the reduction in the overall fee award based on the "degree of success" factor will be 11.25% (15% of 75%).

Appendix B

D. *Total Compensable Hours*

Plaintiff's original request for attorney's fees totaled approximately 2973.8 hours, including 2423.8 hours of attorney time and 550 hours of paralegal time.[24] We first reduce the aggregate number of hours billed by counsel and his paralegal by 25% to account for overbilling. The remaining universe of potentially compensable hours includes 1817.85 hours of attorney time and 412.5 hours of paralegal time.

We next reduce that remaining universe of potentially compensable hours by 20% to deduct for time spent on unrelated, unsuccessful claims. The reasonable number of hours spent on successful claims and related, unsuccessful claims includes 1454.28 hours of attorney time and 330 hours of paralegal time.

Finally, we reduce the number of hours spent on successful claims and related, unsuccessful claims by 11.25% to deduct for the limited degree of plaintiff's success. The remaining number of hours represents the total number of hours for which the Court awards reimbursement. Thus, the Court allows reimbursement of 1290.70 hours for counsel and 292.90 hours for his paralegal.

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24. The Court deducted approximately 139.5 hours from Mr. Bacon's billed time to account for the entries withdrawn by plaintiff.

Appendix B

E. *Reasonable Rate*

1. *Mr. Bacon's Skill, Experience, and Reputation*

Plaintiff requests reimbursement for work performed by Mr. Bacon at the rate of $250.00 per hour.

Mr. Bacon has been a member of the State Bar of California and has worked in the field of employment discrimination since 1982, approximately 12 years before he filed Ms. Norris' case. Mr. Bacon does not state (1) how many cases he has tried, if any; (2) what percentage of his work on employment discrimination cases relates to gender discrimination; (3) what percentage of his work relates to violations of the ADA[25]; or (4) what his customary rate is for similar work. The Court considers Mr. Bacon's skills as a litigator to be no more than average for an attorney in the Bay Area.

2. *Prevailing Rate for Similar Services*

In support of her Petition, plaintiff submitted the affidavits of Barbara A. Lawless, Mark Rudy, and Christopher W. Katzenbach, Bay Area litigators with, respectively, 24 years, 22 years, and 19 years of experience in the employment discrimination field. Ms. Lawless and Mr. Rudy each state that the rate of $250 per hour requested by plaintiff "is within the range of prevailing rates in the Bay Area for similar work by attorneys of reasonably

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25. The Court notes that the ADA was not enacted until 1990.

comparable skill, experience, and reputation."[26] Declaration of Barbara A. Lawless in Support of Plaintiff's Petition for Attorney Fees, at ¶8; Declaration of Mark Rudy in Support of Plaintiff's Petition for Attorney Fees, at ¶8. However, neither Ms. Lawless nor Mr. Rudy indicates what the "range of prevailing rates" actually is.[27]

Mr. Rudy, who has practiced in the field of employment discrimination almost twice as long as Mr. Bacon, charges "rates similar to that charged to Mrs. Norris by [Mr.] Bacon . . . to wit, $250.00 per hour, for work similar to that performed by Mr. Bacon in Mrs. Norris' case." Rudy Decl., at ¶5. Ms. Lawless charges hourly rates higher than $250.00 per hour, but doesn't state what those rates are. Lawless Decl., at ¶5. Mr. Katzenbach's rates are "somewhat below market rates" at $150-200 per hour. Mr. Katzenbach has practiced law in the employment discrimination field for approximately 7 more years than Mr. Bacon.

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26. Ms. Lawless and Mr. Rudy state that they are "familiar with the reputation, ability, experience and knowledge of Mr. Bacon in the employment discrimination field and his reputation, ability, experience and knowledge are all excellent." Lawless and Rudy Declarations, at ¶6. We note that neither of these declarants have personal knowledge of Mr. Bacon's performance *in this case*. Moreover, neither of them sets forth any basis for the quoted assertion. We must assess Mr. Bacon's performance in this case. Therefore, the Court is obligated to give more credence to its personal exposure to this case than to the general statements of declarants made without personal knowledge of this case.

27. Mr. Katzenbach states only that he has been told that hourly rates charged in federal employment discrimination cases range from $225-275.

Based on the evidence submitted and the Court's observations at trial, the Court finds that Ms. Lawless and Messrs. Rudy and Katzenbach have significantly more experience in the field of employment discrimination litigation than Mr. Bacon.

Plaintiff submitted no billing rate surveys and no published opinions establishing a reasonable hourly rate for work of comparable complexity. The Court's own research suggests that $250 per hour exceeds the reasonable hourly rate for an action of ordinary complexity, requiring counsel of usual competence. *Hannon v. Chater*, 900 F. Supp. 1276, 1285 (N.D. Cal. 1995) ($150 per hour reasonable rate for Title VII claim of "ordinary difficulty" and requiring attorney of "usual competence"); *Bernardi v. Yeutter*, 754 F. Supp. 743, 746-747 (N.D. Cal. 1990) (range of $140-150 per hour is reasonable for employment discrimination attorney with approximately 11 years of experience) *aff'd in part, rev'd in part as to different issue by* 942 F.2d 562 (9th Cir. 1991) *and superseded as to different issue by* 951 F.2d 971 (9th Cir. 1991); *Finkelstein*, 804 F. Supp. at 1242, 1245, 1247 ($250 per hour reasonable for *highly skilled* solo practitioner in "indisputably complex" case); *Ortega v. O'Connor*, 1996 WL 724779, *3 (N.D. Cal.) ($235 per hour reasonable for very successful case that required intermittent attention over a 14 year period by experienced attorney who had "participated in important civil rights cases").

Moreover, as a solo practitioner, Mr. Bacon performed some tasks typically performed by a junior associates in larger law firms. Plaintiff has set forth no evidence from a solo practitioner in the Bay Area supporting the contention

that she or he charges $250 per hour for all work performed in connection with a case such as this. *Finkelstein*, 804 F. Supp. at 1246.

3. *Reasonable Hourly Rate for Mr. Bacon in this Action*

The Court awards plaintiff reimbursement at the "blended" hourly rate of $175. The Court's award is based on the following: (1) the absence of information about Mr. Bacon's trial experience, customary rate, etc.; (2) Mr. Rudy and Mr. Katzenbach, who have significantly greater experience than Mr. Bacon, charge less than or equal to the requested rate of $250 per hour; (3) the lack of information from Ms. Lawless and Mr. Rudy about what the prevailing range of hourly rates is in the Bay Area for similar work; (4) the lack of information from Ms. Lawless and Messrs. Rudy and Katzenbach about whether they charge a single rate for all work performed on a matter of this complexity; (5) the Court's observations of Mr. Bacon's skill and its assessment of the level of skill necessary for prosecution of this action; and (6) recent published opinions, such as *Hannon*, that indicate that a substantially lower rate is reasonable in a case of ordinary difficulty.[28]

4. *Reasonable Hourly Rate for Paralegal*

Plaintiff requests reimbursement for work performed by Mr. Bacon's paralegal, Richard Baker-Lehne at the rate of

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28. The Court notes that while defendant objected to the hourly rate requested by plaintiff, it submitted virtually no evidence of its own about the reasonable hourly rate in the community.

$95 per hour. Mr. Baker-Lehne has been a paralegal since 1977. Mr. Baker-Lehne's responsibilities include "administrative" tasks that require no specialized training as well as "law clerk" type tasks, such as research and initial drafting of correspondence and motions, that require a higher degree of training and experience.

Mr. Bacon bills for his paralegal's work at a single rate that does not account for the complexity of the task performed. Mr. Bacon sets forth no evidence that this is an acceptable practice in the Bay Area community. Ms. Lawless and Mr. Rudy state that Mr. Baker-Lehne's rate of $95 per hour is within the prevailing range of paralegal fees in this type of litigation, but, again, do not identify the actual "range" of rates.

The Court's research indicates that $95 per hour exceeds the reasonable rate for work performed by a paralegal, even one performing "law clerk" type tasks. *Bernardi*, 754 F. Supp. at 747 (paralegal time reimbursed at $50 per hour and law clerk time at $55 per hour); *Ortega*, 1996 WL 724779, *5, (court awarded $45 per hour for work performed by law clerks). However, neither *Bernardi* nor *Ortega* noted the level of experience of the paralegal or law clerk for whose work reimbursement was sought. Noting that Mr. Baker-Lehne has 20 years of experience, the Court awards plaintiff reimbursement for paralegal work at the blended rate of $75.

V. EXPENSES

Plaintiff seeks reimbursement of $58,795.82 in costs and expenses. Plaintiff's Statement of Costs in Support of

Petition filed December 20, 1996 ("Statement of Costs"). Plaintiff may recover certain costs pursuant to 28 U.S.C. §1920 and reasonable out-of-pocket expenses normally charged to fee paying clients. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *United Steelworkers of America Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990) (out-of-pocket expenses are part of attorneys' fee, distinct from costs under §1920) *aff'd in part, rev'd in part as to different issue by* 944 F.2d 910 (Table of Decisions without Reported Opinions) (9th Cir. 1991).

On November 1, 1996, plaintiff filed a Bill of Costs seeking $17,797.67 in costs allegedly taxable under 28 U.S.C. §1920. On November 18, 1996, the Clerk of this Court allowed costs in the amount of $15,402.67. As we understand it, plaintiff is not challenging the Bill of Costs except as to the following items which plaintiff submitted in the Statement of Costs and which the Clerk appears to have disallowed: (1) $604 for the trial transcript of Frank Damante's testimony; (2) $434 for the trial transcript of plaintiff's testimony; (3) $42 for deposition witness Bud Bradley; (4) $100 for the travel costs for trial witness Ernestine Nettles; and (5) $692.36 for office supplies used in conjunction with trial exhibits.[29] We find and allow as costs under 28 U.S.C. §1920 $142 for the travel expenses of trial witness, Ernestine Nettles and the deposition fee for the witness Bud Bradley. 28 U.S.C. §§1821 and 1920, Local Rules of the United States District Court for the Northern

29. Plaintiff's Statement of Costs also contains entries that have been allowed previously by the Clerk of the Court. The Court eliminated from the Statement of Costs any expenses previously allowed by the Clerk of the Court.

District of California, Local Rule 54-3(c) and (e). The amounts incurred in connection with trial transcripts and office supplies are not recoverable under section 1920 and are addressed below in connection with "expenses."

In addition to the above costs, plaintiff has asked the Court for reimbursement of more than $50,000 in litigation-related expenses not recoverable under 28 U.S.C. §1920. *See* Statement of Costs. In order to reimburse "non-cost" expenses requested in the Statement of Costs, the Court must ask two questions: (1) are the expenses the kind that are normally billed to fee paying clients by solo practitioners in the Bay Area (*i.e.*, are they part of a reasonable attorney's fee) or are they "overhead" generally absorbed by the attorney and subsumed in his hourly rate; and (2) if the expenses are normally billed to fee paying clients, are they reasonable? For the reasons set forth with more specificity below, the Court allows $23,965.63 in expenses.

A. *Reasonable Expenses Normally Billed to Fee Paying Clients*

The following categories of expenses are normally billed to fee paying clients by solo practitioners in the Bay Area: telephone, postage, photocopying, outgoing facsimile transmissions, messenger deliveries to court for filing, messenger costs for service and delivery of documents, expert fees, travel, paralegal services, and Westlaw computer research. *Harris*, 24 F.3d at 19-20; *United Steelworkers*, 896 F.2d at 407; *Davis v Mason*, 927 F.2d at 1488; *Finkelstein*, 804 F. Supp. at 1264.

Appendix B

1. *Expert and Consulting Fees*

Plaintiff may recover reasonable expert fees incurred in connection with her successful claim that Allied terminated her in violation of the ADA. 42 U.S.C. §12205 (incorporating §2000e-5(k)). Because section 2000e-5(k) does not distinguish between expert *witness* fees and *consulting* fees, the Court assumes that Congress intended to include both. The Court allows $2,125.00 in expert fees billed for Dr. Alfred Tan and $14,025.00 billed for Dr. Phillip A. Berger. Dr. Tan's and Dr. Berger's consultation and/or testimony related to plaintiff's health and, therefore, to her successful ADA claim.

The Court disallows $955.32 billed for Daniel Fiduccia, a consultant on the ADA. The Court found that Mr. Fiduccia was not an expert. *See* Final Pre-Trial Order, filed September 23, 1996. Thus, Mr. Fiduccia's fees are not recoverable as "expert fees." In addition, it appears that Mr. Fiduccia was retained to consult with Mr. Bacon regarding the law applicable to the ADA. Mr. Fiduccia is not, however, an attorney, and plaintiff has not demonstrated why it was necessary or proper to consult with him regarding legal issues. *Accord Davis v. Southeastern Pennsylvania Transportation Authority*, 735 F. Supp. 158 (E.D. Pa. 1990) (Congress did not authorize courts "to compensate non-lawyers for doing attorneys' work").

Although 42 U.S.C. §2000e-5(g)(2)(B) does not state specifically that expert fees are a part of attorneys' fees recoverable for plaintiff's claim that Allied considered gender in decisions not to promote her, the Court finds that

the express inclusion of expert fees in section 2000e-5(k) demonstrates Congress' intent to allow reimbursement of reasonable expert fees for all successful Title VII plaintiffs. *Accord Snell v. Reno Hilton Resort*, 930 F. Supp. 1428, 1434 (D. Nev. 1996). Nonetheless, the Court, in its discretion, disallows $20,015.95 billed for consulting by Lois Allums in connection with plaintiff's claim that Allied considered gender in decisions not to promote her. Ms. Allums, a former employee of the OFCCP, participated in that agency's investigation into Allied's employment practices. The Court prohibited Ms. Allums from testifying as an expert on the grounds that her area of expertise (OFCCP procedure) was irrelevant. *See* Final Pre-Trial Order, filed September 23, 1996. Moreover, plaintiff has not explained what Ms. Allums *did* in exchange for $20,015.95. *E.g., In re Brooktree Securities Lit.*, 915 F. Supp. 193 (S.D. Cal. 1996) (no breakdown of hours expended by expert tending to show reasonableness of services). To the extent she conveyed information obtained during the OFCCP's investigation, plaintiff could have subpoenaed that information for far less than $20,015.95.

The Court also disallows $5,850.00 billed for Beatrice Cummings' services "[a]rranging, analyzing, and interpreting all financial records" in connection with this case. Statement of Costs, at 9. Mr. Bacon argues that Ms. Cummings' services are recoverable because she is a member of his staff. Mr. Bacon sets forth no evidence that demonstrates such membership and fails to establish why her services were necessary or even reasonable.[30] Furthermore, even if Ms.

30. The Court suspects that Ms. Cummings' work relates to Ms. Norris' alleged damages and/or Allied's finances for purposes (Cont'd)

Cummings was a member of Mr. Bacon's staff, plaintiff has not demonstrated that the services Ms. Cummings provided are normally billed to fee paying clients.

The Court disallows $165.00 in consulting expenses paid to John Riccio, Esquire. Counsel's description states only that he consulted with Mr. Riccio about the deposition notice of Mr. Radeleff. Mr. Bacon has not demonstrated the necessity for or reasonableness of this consultation.

2. *Other Expenses*

The following expenses are reasonable considering the case as a whole (*i.e., not* accounting for the expenses incurred in connection with unsuccessful, unrelated claims or plaintiff's modest degree of success): $26.93 for long-distance telephone costs;[31] $52.71 for postage; $1,209.30 for photocopying;[32] $37.00 for outgoing facsimile

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of assessing punitive damages. The Court, however, has no way of knowing for sure. Moreover, work performed in connection with plaintiff's punitive damages claim cannot be recovered because that claim was unsuccessful.

31. Mr. Bacon charged $53.86 for one telephone call to his office from Texas. Because the Statement of Costs does not indicate with whom at his office he was speaking or what they discussed, the Court cannot assess the reasonableness of this call. Because the unexplained call appears on its face to be excessive, the Court reduces the claimed amount by 50%.

32. The Court allows the photocopying rate billed by counsel. The Court disallows photocopying costs for documents that related to Sysco only or to plaintiff's unsuccessful punitive damages claim.

transmissions;[33] $6734.50 for paralegal services;[34] $12.62 for research on Westlaw; $222.62 for messenger services for court filings; $632.00 for messenger services other than those for court filings;[35] and $1,042.25 for travel expenses.[36]

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33. Plaintiff failed to demonstrate the rate normally charged by Bay Area solo practitioners. The Court allows one dollar per page.

34. We allow 1,619.50 for contract paralegal services. Statement of Costs, at 11. We also allow $5,115 for compiling, indexing, organizing, and copying exhibits and related documents for trial. Statement of Costs, at 13. We find that these services are the equivalent of paralegal type work and are, therefore, compensable. However, we reduce the hourly rate submitted by plaintiff for these services because plaintiff has submitted no evidence that the hourly rate of $62.50 is the prevailing rate in the Bay Area for such services. In light of our determination that $75 per hour is the reasonable hourly rate for a highly experienced paralegal, we reimburse this work at the rate of $50 per hour.

35. The Court disallows $21.75 billed for Federal Express charges incurred to send the Complaint and other documents to a Texas process server for service on Sysco because plaintiff's claims against Sysco were unsuccessful. In addition, the Court allows only $75 for messenger deliveries to Ms. Norris (or just over 25% of the amount submitted). It is unreasonable to charge defendant for messenger deliveries to Ms. Norris where counsel could have sent his client information more cheaply via United States mail or Federal Express. Counsel has not demonstrated that legitimate time constraints required him to use personal deliveries for materials sent to Ms. Norris.

36. The Court disallows expenses for Ms. Norris' travel to Houston, Texas to attend the depositions of other witnesses. Plaintiff

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The Court found little authority addressing the recoverability of transcript costs in excess of those allowed pursuant to 28 U.S.C. §1920. In *Finkelstein*, this Court held that transcripts do not appear to be allowable as part of an "attorney's fee." 804 F. Supp. at 1263 *citing Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624, 639 (6th Cir. 1980). However, the Court's research indicates that some district courts have allowed transcription expenses in excess of those permitted by §1920. *E.g., Keith v. Volpe*, 644 F. Supp. 1317, 1326-1327 (C.D. Cal. 1986) (allowed where important to the effective prosecution of the case); *Kersch v. Board of County Commissioners of Natrona County*, 851 F. Supp. 1541 (D. Wyo. 1994); *Luciano v. Olsten Corp.*, 925 F. Supp. 956 (E.D.N.Y. 1996). The Court finds that $1,038 in expenses for the trial transcripts of Frank Damante's testimony and for plaintiff's testimony are reasonable because of these witnesses' importance to the case. However, the Court disallows $60 for the transcript of a deposition in which the deponent failed to appear.

These expenses total $11,007.93.[37] The Court reduces these expenses by 20% to reflect the percentage of

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fails to justify her presence at those depositions. We also disallow expenses incurred for picking up Ms. Allums for a meeting between her and Mr. Bacon for the same reasons that her consulting fees are disallowed.

37. The Court notes that a handful of entries contained more than one expense but did not allocate the total amount billed for that entry between the two expenses. The Court, therefore, determined the allowable amount for each task based on comparisons to other similar entries.

unsuccessful claims that are unrelated to plaintiff's successful claims and by another 11.25% to reflect plaintiff's "degree of success" — *see*, sections IV(B) and IV(C) above, and, thus, awards $7,815.63 for "non-expert" out-of-pocket expenses.

B. *Disallowed Overhead*

Plaintiff has failed to demonstrate that the following expenses normally are charged to fee paying clients: in-house clerical work such as labor for photocopying, wordprocessing, and preparation of trial exhibits by someone other than a paralegal; incoming facsimile transmissions; and office supplies. The Court's research suggests that these expenses are more appropriately considered "overhead" subsumed in Mr. Bacon's hourly rate.[38] Accordingly, these expenses are disallowed.

VI. INTEREST ON FEE AWARD

Plaintiff is entitled to post-judgment interest on her attorney's fee award pursuant to 28 U.S.C. §1961. *Friend v. Kolodzieczak*, 72 F.3d 1386, 1391 (9th Cir. 1995). Interest runs from October 24, 1996, the date judgment was entered in plaintiff's favor on her claim that Allied terminated her in violation of the ADA and her claim that Allied considered

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38. The Court found no controlling case law that supported plaintiff's request. *See also Real v. Continental Group, Inc.*, 653 F. Supp. 736, 744 (N.D. Cal. 1987) (wordprocessing charges already in overhead); *Jones v. Armstrong Cork Co.*, 630 F.2d 324, 325-326 (5th Cir. 1980) (salary of employee who conducted mostly clerical duties was considered overhead).

gender in decisions not to promote her. *Friend*, 72 F.3d at 1391-1392 (interest runs from date entitlement to fees is secured not date that amount of award is determined); *Finkelstein*, 804 F. Supp. at 1239-40. Plaintiff is entitled to interest at the rate of 5.64%. 28 U.S.C. §1961.

VII. CONCLUSION

The Court allows reimbursement of 1290.70 hours expended by Mr. Bacon at the rate of $175 per hour and 292.90 hours expended by his paralegal at the rate of $75. The Court awards plaintiff $247,840.00 in attorney's fees and $24,107.63 in costs and expenses, for a total of $271,947.63, as well as post-judgment interest to accrue from October 24, 1996 at the legal rate of 5.64%.

Dated: August 6, 1997

s/ Wayne D. Brazil
WAYNE D. BRAZIL
United States Magistrate Judge